SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 4

CASCADE NATURAL GAS CORPORATION, APPELLANT,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

No. 5

PEOPLE OF THE STATE OF CALIFORNIA, APPELLANT,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

No. 24

SOUTHERN CALIFORNIA EDISON COMPANY, APPELLANT,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

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[fol. 454-641]

Transcript of Proceedings—December 11, 1964

The Court: All right.

FURTHER ARGUMENT BY MR. HARRISON ON BEHALF OF EL PASO

Mr. Harrison: May it please the Court, yesterday the Court discussed with counsel for the United States authorities which they might produce to your Honor to justify expropriation of El Paso's after-acquired property for the benefit of the New Company.

The Court will recall that we had cited two cases, Schine against the United States and Reynolds Metal Company against the Federal Trade Commission. The Court will recall that, although the Schine case was a Sherman Act conspiracy case, in which the problem of divestiture of illegal profits obtained in a conspiracy is authorized under the law, it squarely holds that even such a conspirator may be divested only of the property acquired in the course of the violation. And again, in the Reynolds Metal decision, which was a Section 7 case, it held that property acquired by defendant after such an illegal acquisition violating the Clayton Act may not be divested.

The Government has not produced any case to the contrary, nor, as I recall, did they discuss these two cases, which seem clearly in point.

Instead, it referred to certain cases involving the problems of security holders, which were incorporated in a memorandum dealing with an entirely different subject, [fol. 454-642] that is to say, instruments relating to El Paso's indebtedness.

Now, the cases there cited, except for the Schubert case, did not involve antitrust. Antitrust was not involved in the Schubert case. They declare a general principle that

the Court is empowered to deal with the security lenders of a defendant who has suppressed existing competition through a conspiracy violating the Sherman Act if it is necessary to readjust lenders' security to provide effective relief. On their facts we do not question the holdings of the two cases cited by the Government.

And the Government's claim that these railroad trust Sherman Act decisions provide a legal basis for its unprecedented position here is remarkable only and astonishing in consequence.

In our memorandum on El Paso's proposal for distribution we analyzed the essential distinction between Sherman Act cases and Section 7 cases. We quoted the admonition in this respect of the Supreme Court in the duPont case that relief is not to be punitive.

The Government's position on El Paso's San Juan reserves violates these rules of duPont no less than its unprecedented claims respecting the stock distribution question.

Now, if your Honor please, we do not have any occasion to represent to this Court what the power of this Court may be with respect to the position of the security holders [fol. 454-643] here. We do not represent them. They are not before the Court. Whether the Court's power exists to compel the security holders to adjust their security on some other basis than at present satisfactory to the Court is a question not now before us, and, if the question were to arise, I would presume that, under due process and as a matter of propriety anyhow, the Court would summon the security holders before him, and they would here be represented to present their own views upon that matter.

The significant thing here is that, as a practical matter, the Supreme Court has ordered prompt divestment; and to institute proceedings to rearrange the security relationship between the creditors of El Paso and El Paso and the New Company would entail, I feel confident prolonged proceedings of an extremely intricate character, and thereby

would certainly defeat the purpose of the Supreme Court's decision.

Furthermore, it is to be noted that these security holders, while not here, are not here presumably because, for a period of six months, having been consulted on a plan to which they had indicated their assent, there was no occasion for them to be here. And, since the attack upon the plan is only at the eleventh hour, they are not yet aware of that attack or that their rights may be affected thereby. And so we suggest that, during the past six months, there has been created in a sense a moral responsibility of the Attorney General in respect to this matter [fol. 454-644] and that if the Attorney General now proposes arrangements which require such prolonged proceedings with the security holders, they are not acting in keeping with the mandate of the Supreme Court. I would think they would be under some sort of a moral estoppel in the matter.

So much, if your Honor please, for the authorities upon this question. I will leave with the Court a memorandum discussing these authorities from the point of view of the defendant and repeating the only two cases which can be found by counsel on either side and the only two controlling cases.

Passing, if I may now to the problems being discussed yesterday, that is to say, the attempt to carve out of El Paso's after-acquired assets certain portions of its reserves in the San Juan Basin, I have occasion to wonder—or I did have occasion to wonder—why the Attorney General insisted upon carving his properties in the way of reserves out of San Juan properties after acquired by the defendant.

As the record here shows, and as the Court is well advised, it is necessary for El Paso, speaking of it alone and excluding the New Company's problems, to acquire something in the nature of a trillion cubic feet of gas a day merely to maintain its position with respect to its

existing markets, that is to say, to replenish its supplies as they are exhausted.

[fol. 454-645] And so, as this Court knows and as this record shows, El Paso is diligently searching for supplies to satisfy its needs continuously. In fact, that was one of the purposes of its acquisition in this case. And, of course, it has acquired supplies, I presume, in various parts of the basins which it reaches, and I can't help but wonder why the Attorney General wishes to carve this asset out of El Paso's acquisitions from the San Juan Basin. Why not the Permian Basin? Why not some other place?

Well, it became clear yesterday why. In fact, Mr. Lipson made it very clear. It all revolves around a plan which permeates all of the opposition of the Government here to pass off the assets which were to be transferred to the New Company directly to another pipeline company and to constitute that new pipeline company in such a manner that it could promptly offer a new segment of gas—not a new segment of gas—a new block of gas to Southern California of such proportions as to justify the building of a pipeline instanter.

[fol. 454-646] Now, this runs through all of the objections of the Government, from the plan of divesting to the stockholders of El Paso through each of the contractual arrangements. Mr. Lipson made it clear yesterday that while he professes ignorance in the natural gas pipeline industry that he is quite resourceful at proposing various pipeline projects for this Court to create. He pointed out to the Court various points on the pipeline of the New Company, formerly Pacific Northwest, from which such a project might take off; and he suggested to the Court that this gas to be carved out of El Paso's after-acquired assets could be moved to the North to such a northerly point or could be moved directly to the Southern California market, and moving to the North would fit in with surplus of gas from Canada, and thus make it possible to promote a project.

I almost wondered whether it was Mr. Fish discussing a project yesterday instead of Mr. Lipson; he seemed quite as resourceful as Mr. Fish in promoting a project.

Now, of course, gas acquired by El Paso in other parts of the country would not promote that sort of a project.

Now, first, we start with a plan to distribute to the shareholders of El Paso—that does not fit the Attorney General's plan, because it does not envisage the bringing in of a pipeline company to take over in the place of distributing the shares to the many thousands of stockholders.

[Tol. 454-647] In the second place, the proposed plan does not fit in, quote because, unquote says Mr. Lipson, "we do not have in the San Juan Basin for the New Company enough gas supply to go to Southern California."

Now, of course, they didn't have it ever, because if we're to believe the figures that he's offered us, obviously they had very little in San Juan at the time that it was acquired. This is contrary to the findings of the Supreme Court, contrary to the evidence. But this is the natural result of what he says.

And so not finding that they don't have as much as they thought they had, they want some of El Paso's after-acquired gas reserves.

Now, let's turn to the contract situation. Mr. Lipson objects to the proposed contract between the New Company and El Paso which calls for El Paso to take certain quantities of gas over a period of five years to relieve any problem of the New Company because of its surplus of gas from Canada. It is willing—it offers in the contract which it proposes to take a surplus of gas of the New Company off its hands until it can work its market demand up to the point where it can absorb it all. This surplus of gas, by the way, in Canada, which Mr. Lipson wants us to absorb at enormous losses, hardly coincides with his claim that he needs some of our after-acquired assets in the San Juan Basin.

[fol. 454-648] We would think he at least would use what he's being offered in his own market before he starts to carve out some more reserves from El Paso.

Now, what is this proposal? This proposal is that a contract, which was never entered into, and therefore cannot be called a contract, to be reinstated, which provides that to the extent that Kingsgate gas is not absorbed in the market demand of the New Company, it will be turned over, dumped on, El Paso; and El Paso will paid the border price of 25 cents plus the cost of transportation through the P.G.T. line to Tacoma, plus the cost of service of the New Company for transportation to the pipeline system of the New Company, estimated a cost of 28 cents a cubic foot.

In exchange for that, it is proposed that they will return us 14½ cent gas, or, with our proposed charge, 18½ cent gas in San Juan. And by the way, under the contract the seller, the New Company, is the sole judge of what its market demands are, and so it can dump at pleasure. And it can dump enormous quantities, because it's perfectly simple for the New Company to choke the Sumas line to its full capacity with all the Canadian gas it can get, and then dump its surplus from Kingsgate on El Paso. The net result is that El Paso pays 28 cents per cubic foot, and the New Company nets the cost of 13½ cents for gas delivered at the border and immediately into its market.

[fol. 454-649] This, of course, is expropriation again. This is just as much expropriation as taking on after-acquired or any of our assets from us. This is expropriation in its worst form.

Now, after it positions the New Company in this manner, so that it can dump any excess that it wishes or can provide upon El Paso at a cost of 28 cents instead of 18½ cents, with a profit of 12 cents to the New Company and a loss of 12 cents to El Paso—and that cost, of course, is presumably to be passed on to the southern rate payers—we come to the next stage. All of the gas of the New Com-

pany is to be gathered by El Paso. And I believe at a price originally prevailing was one and 37/100 cents per cubic foot. That was a price which prevailed with respect to a very limited aggregation of gas properties, a relatively small number of wells. The contract provided that it should apply only to those properties and those wells, and that if additional wells and additional properties were to be added, the contract would be amended. And the contract further provided that the price was to be the fair cost of service and that from year to year it would be subject to change, with the approval of the Federal Power Commission.

That contract, of course, ceased to exist in 1960. In the meantime, the number of wells and the number of properties have been growing and growing and growing; [fol. 454-650] and now we're asked to make the same contract and suffer a loss of 75 per cent of the cost to subsidize this new pipeline company in its project to California. This again runs into the question of expropriation; and these same authorities that we have offered, your Honor, with respect to excising from the properties exclusively those of El Paso, its natural gas reserves, apply to these contracts, as well. And the point is that the whole thing opens into a network of proposals for the purpose of creating for some pipeline company a project tomorrow to California at the expense of El Paso.

We briefly allude to those matters because what we have said with respect to the legal aspects of expropriating the properties of El Paso Natural Gas Company in the form of physical properties or reserves applies equally to the imposing upon El Paso of contracts which impose upon it a servitude to subsidize this proposed new pipeline company in its California aspirations, which seems so close to the heart of the Attorney General.

Further Argument by Mr. Lipson on Behalf of Government

Mr. Lipson: May it please the Court, I'd like to commence by answering Mr. Harrison's questions about why the Government is interested in the San Juan Basin and not interested in the gas that El Paso has acquired in the Permean Basin and elsewhere.

Frankly, the San Juan Basin so far as we were aware was the principal area where Pacific Northwest and El [fol. 454-651] Paso both competed for gas reserves. If Mr. Harrison wants to make any proposal about allocating gas in the Permian Basin, this is news to us, your Honor, and we'd be glad to entertain any such proposal.

I would like to draw your Honor's attention to some language that was reported from the duPont case, which is a Section 7 case, your Honor.

"Those who violate the act—"

—the language reads—

"—may not reap the benefits of their violations avoid an undoing of their unlawful project on the plea of hardship or inconvenience."

We think that with respect to the gas reserves and with respect to other matters as well, including the contracts, El Paso would be in exactly the same position. For example, just with respect to the contract changes; El Paso has put a proposal before this Court which contemplates that New Company and El Paso will enter into four contracts subsequent to the divestiture. These contracts were premerger contracts in part, or related to premerger contracts. And it seems only proper that New Company, being created in this divestiture, should succeed to the contractual obligations to the benefits and the burdens of its predecessor company, Pacific Northwest.

The Government does not object to the reestablishment [fol. 454-652] of those contractual relationships as they existed at the time of the merger. What we do object to,

your Honor, is that in the case of two of these four contracts, the El Paso proposal asked this Court to direct New Company to enter into different contracts, different contractual arrangements, than existed at the merger date.

In both cases, your Honor, in our view, the contracts are probably detrimental to New Company; but in a larger sense, what El Paso is asking this Court to do is to order New Company to enter into certain relationships that may have no bearing on the antitrust features of this case. These changes in the two contracts we refer to have been unilaterally designed by El Paso. The two contracts to which I refer are the ones generally called the Kingsgate contract in this case and the gathering agreement in the San Juan Basin.

With respect to these contracts the Government reemphasizes that we before this Court, the Antitrust Division, the Department of Justice, do not pass ourselves off as natural gas experts, your Honor, and we are not, therefore, accusing El Paso of overreaching with respect to these contracts.

Nevertheless, an attempt to force a unilaterally effected change on New Company certainly gives rise to certain suspicions, particularly since all changes appear to be to New Company's detriment.

In our view, since these changes are not necessary for [fol. 454-653] decision of the antitrust implications in this case, we think it would be the wiser course not to ask this Court to decide on whether or not such changes are reasonable. There are normal regulatory procedures that should not be bypassed in these matters. I am referring, of course, to the Federal Power Commission.

With respect to the Kingsgate contract, your Honor, the Kingsgate contract is the one in Tab 5 of Defendants' Exhibit A. The modified version which is contained in that exhibit gives New Company an obligation to take the entire amount of gas to be delivered under the Kingsgate agreement at a very high load factor of 90 per cent; that is, is required to take 135 million cubic feet daily. This is

apparent from the testimony of Mr. Boyd at page 42 of the transcript of the October 19 proceeding.

El Paso concedes at that same place in the transcript, your Honor, that so much Canadian gas to be taken under so high a load factor may be difficult for the New Company to absorb.

El Paso, therefore, proposes to give some of this gas to El Paso under a 5-year period; a kind of option.

However, the amount of gas that is covered by this option is relatively small when it's compared with the contractual proposal that existed at the merger date; that is, under the revised contract contained in Tab 5 of Defendants' [fol. 454-654] Exhibit A, El Paso would be obligated to take for the first year 22 billion cubic feet, for the second year 18 billion cubic feet, for the third year 13 billion cubic feet, for the fourth year 10 billion cubic feet, for the fifth year only 6 billion cubic feet; and thereafter it would no longer have any obligations whatever.

Compared to that, Pacific Northwest had a much more valuable contract, a valuable contract right, under a preexisting arrangement that is known as the X-5 tariff that was in fact filed with the Federal Power Commission by El Paso shortly prior to the merger date. That document is contained in Government's Exhibit No. 8. The relevant portion of Government's Exhibit No. 8, your Honor, appears in Article 4. It is in a sense the coresponding article to the option provisions that I've just summarized with respect to the new contract. Article 4 provides under heading, "Purchase and Sale of Gas":

"El Paso agrees to take and purchase from Pacific, and Pacific agrees to sell and deliver to El Paso, commencing January 1, 1961, natural gas in daily volumes substantially equivalent to those from time to time then being received by Pacific from P.G.T., the point of delivery from P.G.T. to be at the point of interconnection between the facilities of P.G.T. and Pacific in the vicinity of Spokane, [fol. 454-655] Washington; provided, however, and notwithstanding the foregoing, that Pacific shall have the unre-

stricted right to curtail or interrupt such deliveries with prior notice to El Paso whenever and to the extent in Pacific's sole judgment such curtailment or interruption is required in order that Pacific may satisfy the demands of its other customers for natural gas service."

That contract, your Honor, as I say, was filed with the Federal Power Commission. It bears the name of Mr. Paul Kayser, President, as the party issuing the contract.

Mr. Harrison: May I ask what you're referring to?

Mr. Lipson: Yes. The notation at the very bottom of the contract: "Issued by Paul Kayser, President."

Mr. Harrison: Where is this?

Mr. Lipson: On Government's Exhibit No. 8.

Mr. Harrison: Well, this was simply a rate schedule that was proposed by Mr. Kayser. It has nothing to do with the contract, and it never went into effect.

Mr. Lipson: Well, your Honor, I think the document speaks for itself as to whether or not it has anything to do with the contract.

Mr. Harrison: If it speaks for itself, it's certainly not a contract, because nobody ever executed it; and yet you call it a contract repeatedly.

Mr. Lipson: Your Honor, the very title of this agree-
[fol. 454-656] ment is—

The Court: Well, was it executed?

Mr. Lipson: Sir, the merger—the asset merger occurred before this contract could be executed in fact. Prior to that time—

The Court: Well, if it wasn't executed, it never became a contract.

Mr. Lipson: I understand that, your Honor. I'd merely like to bring out, immediately prior to the asset merger date, this was filed with the Federal Power Commission by El Paso. It was a proposed agreement. Mr. Boyd has testified to the fact that it was a proposed agreement. This was the status of the companies immediately prior to the asset merger. Obviously, after the asset merger, agreements between the two companies were of no point at all. So the thing naturally fell for that reason.

Mr. Harrison: Mr. Boyd testified that it was not a contract and that it was never executed, and the exhibit which you have is unexecuted; and you persist in calling it a contract. You went to law school. You know what a contract is.

The Court: Well, let's not deal in personalities.

Mr. Lipson: Your Honor, this is a proposed contract. I can do no more than quote from the document itself. I have no desire to get into an argument with counsel on the [fol. 454-657] matter, but the document says—

The Court: I'm not going to let you get into an argument.

Mr. Lipson: The document says on its first page: "Agreement between El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation, dated September 1, 1959."

Obviously, your Honor, the effect of that provision is to give New Company a right to take as much or as little gas as it requires. That option is of course more valuable than the option proposed in the Tab 5 of Defendants' Exhibit A.

The Court: It never came to anything.

Mr. Lipson: Well, your Honor, I'd merely like to point out that the Tab 5 version of the Kingsgate agreement—

The Court: Did you have these fellows look at this chair here?

The Bailiff: Yes, sir.

The Court: Well, it's obvious that they didn't do anything. Listen to that. Let's get that fixed. What a horrible thing! Squeak, squawk, groan!

Go ahead.

Mr. Lipson: Yes, your Honor.

The Court: Let the record show I wasn't talking about Mr. Lipson. I was talking about my chair. I'm having an awfully hard time to get this chair fixed.

Mr. Lipson: The version of the agreement contained in [fol. 454-658] Government Exhibit 8, your Honor, obviously

frees New Company, or Pacific Northwest, if you will, of the burdensome effect of taking gas at a 90 per cent load factor. It enables it to make a full use of the flexibility that is inherent in the kind of a pipeline which is able to tap several geographically distinct sources of gas supply.

Most importantly, the changes that have been made that are reflected in Tab 5 of Defendants' Exhibit A are unilateral. If Government Exhibit 8 never materialized into a contract, neither, your Honor, is Tab 5 of Defendants' Exhibit A a contract; and there's certainly no reason for presuming that it would be fairer to impose a harsher contract on New Company than the one that was actually negotiated, even though it may not have been actually executed.

New Company has obviously never had an opportunity to negotiate or bargain with respect to the Tab 5 version of this contract. The New Company management are apparently not to be given an opportunity to even disapprove of the changes. So far as we can tell, your Honor, the Federal Power Commission itself may even be denied an opportunity to pass upon that change prior to the time the contract is put into execution.

We think that the changes reflected between Government Exhibit 8 and Tab 5 of Defendants' Exhibit A are manifestly to New Company's detriment. At the very least, New Company should be returned to the same position that [fol. 454-659] it occupied on December 31, 1959, prior to the time of merger.

At that time the existing contract, Government Exhibit 8, was filed as a proposal with the Federal Power Commission and would be subject to the normal jurisdictions of the Federal Power Commission.

We see no reason why the normal jurisdiction of the Federal Power Commission should be overridden in proceedings where it is not necessary to do so, and we don't think it's necessary in the current proceeding, your Honor. [fol. 454-660] With respect to the San Juan gathering agreement, which is contained in Tab 4 of Defendants' Ex-

hibit A, here, too, it appears that El Paso seeks to use these divestiture proceedings to bring about changes in an agreement between itself and Pacific Northwest.

Now here there is no question that the agreement did exist as an executed contract prior to the merger date. Indeed, when a standard existed prior to the stock acquisition date, and the date of the contract being August 2, 1956, in its important respect that contract provided for a reciprocal gathering charge of 1.375 cents per mcf in the San Juan Basin.

El Paso now seeks to use these antitrust proceedings to increase the rate charge to 4.5 cents. Again, the antitrust division does not presume to determine fair, reasonable, equitable costs involved in gas rate matters. We think that is not our particular or proper function.

Yet it appears that these proceedings are going to be used in order to effect such rate changes.

We think here too the changes are unilateral. El Paso has bargained with El Paso in this matter, and New Company has had no opportunity to participate in this bargaining session and represent itself on its own behalf.

Importantly the net balances of the increase in the gathering charges will have to be borne exclusively by New [fol. 454-661] Company. This is shown by Government's Exhibit 8 and by calculations that can be made directly therefrom.

Such calculations, your Honor, appear in the Government's brief on Page 15, the first memorandum the Government submitted. I would just like to draw your Honor's attention to a few of the numbers. Comparing the 1.375 cent cost with the 4.5 cent change that El Paso proposes, the New Company increase in gathering costs will be, for the year 1965, $349,122; for the year 1966, $419,647; for the year 1967, $528,816; for the year 1968, $606,459; for the year 1969, $615,385; for the year 1970, $644,621.

Obviously, these increased costs are going to have to be paid for by the rate payers, eventually.

Thank you, your Honor.

Further Argument by Mr. Harrison on Behalf of El Paso

Mr. Harrison: A few matters I might mention. I hadn't intended to initiate a full scale argument on these contracts, if your Honor please, because I assumed that we were primarily directing ourselves as yet to the reserves of the El Paso and San Juan Basin which the Attorney General would like to take from the company. The reason I mentioned these other contracts was because they are confiscatory. They are not only confiscatory, but they are contracts that, if they came before your Honor in a court of equity for specific enforcement, the Court would refuse to enforce as unconscionable.

[fol. 454-662] No. 1, counsel talks frequently about unilateral bargaining. If this Court thinks there has been anything unilateral about what this company has been doing, I wish to disabuse the Court's mind. We have been bargaining with the Attorney General, and the assistants to the Attorney General, and I want to tell you that's bargaining, and that's hard bargaining.

We have also been bargaining with the holders of securities, and we have had to satisfy the holders of those securities, that the result of this proposed plan would result in two strong pipeline companies. We did so, and that was hard bargaining.

I don't know how counsel considered we are bargaining with this Court. We are presenting to this Court a proposed plan, and that is not bargaining. That is presenting it to the Court upon its merits and asking the Court for a decision. And that is not bargaining, and it is not unilateral. I think Mr. Lipson's activities here would prove to your Honor that we are not acting here unilaterally.

Now, counsel also has made some suggestions that they don't want these contracts, if your Honor please, that they are doing us a great favor to allow us to enter into these contracts. Now Mr. Lipson must know that is not so. He must know that, if we didn't have a gathering contract

with New Company, that it would have to invest an enor-
[fol. 454-663] mous sum of money, which I would suggest to your Honor would be in many, many millions of dollars, perhaps 15 to 20 million dollars. It would have to bear these costs on its own, which would be more than six and a quarter cents. They would be perhaps 15 cents.

And so it was incumbent upon this company to propose to the security holders and to the Attorney General and to this Court a gathering agreement to the end that this company would be able to function. Without it it simply couldn't function.

Now the question is whether we should be told to go back to an old agreement which no longer exists, and hasn't existed since 1960, which specifically provided: No. 1, that the test would be fair cost of service, which specifically limited that service to a confined area and a limited number of wells, and provided for amendment, if the service was extended. It did not exist for four years, and during that period of time the gathering cost was carried at cost on the books of the Northwest system. And so we have no contract.

And so we offered a contract at a price which, as the record shows, no one has suggested is not fair, and we are asked by the Attorney General to adopt a price which would be approximately one quarter of our cost of doing business. [fol. 454-664] Now he speaks of the burden of the rate payer resulting from such a charge. It is only a question of which rate payer, your Honor, and, intervening between the rate payer, which company. Somebody has to pay the cost, and he wants El Paso to pay New Company's cost of gathering. And that is why we mentioned this morning that that is a contract which is unconscionable and confiscatory.

Counsel says, "Oh, don't fix the cost of what is admittedly a fair price"—indeed much less than the cost, four and a half as against six and a quarter—"don't do that, your Honor, because your Honor should leave it to the Federal Power Commission to do it. But, your Honor, fix the price

at 1.37, which is confiscatory. You will be fixing it at a confiscatory price, instead of a fair price. And then let El Paso try to do the best it can with the problem that then confronts it. This Court will exercise its power."

We submit this Court will not exercise its power to place El Paso in a contractual servitude to subsidize the proposed New Company that the Attorney General proposes, and that if it fixes it at all it will fix it at the price which, by agreement of everybody, is fair and just, and not one which results in confiscation.

Now, passing on to this Northwest Pipeline agreement, again we talked about unilateral bargaining. In one moment Mr. Lipson says: "The old Pacific Northwest made [fol. 454-665] this deal. They made this deal and really, in all honesty, they are contracting." And what deal did this old Pacific Northwest make? They made a deal for 150 million cubic feet through Kingsgate at a 90 per cent load factor. And now, when he discovers that there is a problem confronting them to get rid of this gas he blames El Paso and says, "El Paso must have done this and El Paso has to bail it out of its contract for the Kingsgate gas."

Well, we do assume the responsibility; it is the latter decision which is correct.

Now he suggests that he doesn't want any contract, in one breath, but in the next breath he asks for a contract, which again is confiscatory. If he doesn't want the contract we have offered we are perfectly glad to withdraw it from the plan. The reason we offered it was because it was the belief of El Paso, after bargaining with the Attorney General's Office and after bargaining with the security holders, that there would be a type problem for the New Company in the next five years to take all this gas into its market, but that within five years it could absorb it. And so it offered the New Company an option, totally the New Company's option, to take these annual quantities of gas decreasing for five years to permit its market to catch up so it could certainly handle all of the gas it had to take.

Counsel read what he called a contract, which was simply [fol. 454-666] a proposed tariff, which never was acted upon by the parties, which was never acted upon by the Federal Power Commission, and which was never a contract. I hope that is clear. But he said they discussed such a contract, it was considered, and therefore it should now prevail.

Well, he simply has no basis, even on this theory of continuing a contract.

Now, I say to your Honor that in respect to this situation he read to your Honor what the contract provides, and it said just what I told your Honor. It said that in the sole judgment of the New Company, they are entitled to dump upon El Paso such of the Kingsgate gas as in their exclusive judgment is not needed for their market at 28 cents, and return us gas costing them 14½ cents.

And I say to you again that to subject this company to such an onerous obligation where it would be provided for the New Company 13 cents gas at its border for its customers and impose upon our company and all of the southern markets 23 cents, in San Juan, is upon its face confiscatory.

You will recall, your Honor, that this contract was entered into—was not entered into, but was considered by El Paso at the time that it was the sole owner of all of the stock, 99½ per cent of its subsidiary, and of course what it might propose to its subsidiary, what it might consider in connection with proposed tariff, is quite a different thing [fol. 454-667] than when the New Company becomes independent.

But, in any event, it never was a contract, and it never went into effect.

Again, I say to your Honor that this all seems to gather around the same plan. The plan is that a new pipeline company shall move into the New Company's assets and that the southern markets, southern markets and the California markets, shall be asked, through El Paso Natural Gas Company, to surrender its reserves acquired to sup-

port those markets to the New Company—specifically in San Juan, confessedly because that is the nearest to California—it is going to be asked to subsidize the New Company with gathering charges. And counsel read you an exhibit, in which he showed how over a period of years these amounts would continue to grow, until, at the rate of 4½ cents, I think it could get up to nearly a million dollars.

Well, the more it grows the bigger the losses for El Paso, and the bigger the losses for the southern markets, because when we serve at one-quarter of our cost, it's like the retailer of bread who sells at 4 cents and buys at 5; the more bread he sells the sooner he's going broke. And that's the kind of an onerous contract he wishes us to accept. And that is to subsidize this proposed pipeline to California. And finally the combination of that, with the proposed contract—which was never a contract in the past—[fol. 454-668] to absorb whatever supplies at Kingsgate the New Company chooses to dump on us, we submit presents the total program of confiscation, and we submit that the plan submitted by the company is fair in all of its aspects.

Further Argument by Mr. Lipson on Behalf of Government

Mr. Lipson: Your Honor, I would just like to make one or two comments with respect to Mr. Harrison's statements.

In our view, El Paso, with respect to these contracts, is asking for this Court to enter into what is nothing more than a rate-fixing proceeding. We think that in this area there is a body, the Federal Power Commission, that has all the necessary authority, all the necessary expertise, and all the necessary procedures and personnel to deal with this under their normal jurisdiction. We think they are the proper persons, the proper parties to inquire into changes and contractual obligations. We have some doubt as to whether we can represent the public interest in the same sense that the Federal Power Commission can in re-

spect to rate proceedings, and we have some doubt that this Court is the proper place for rate proceedings to get involved.

As your Honor has already seen, it can do nothing more than stimulate many, many, many intervenors to try to get in, to try to protect their rate interests, because these changes in the contract have rate implications, unquestionably they do.

We seek to avoid that. We seek to let the Federal Power [fol. 454-669] Commission exercise its normal jurisdiction with respect to contractual arrangements. To the extent it is possible to do so, we seek to have the normal forces of the market, that is, have two parties bargaining at arms length, determine their contractual relationship.

We don't know whether the El Paso agreements are fair or unfair, and we won't presume to make any determination of those matters. We merely say that they should be arrived at in the normal way, under the normal jurisdiction, that such contracts are usually arrived at and to which certain changes in existing contracts are usually arrived at.

It is unfortunate that an attempt is apparently being made to use a divestiture decree as a mode of changing the rate structures, and we feel that this is precisely the situation that the Court is presented with with respect to these contracts.

We are not saying that El Paso shall be precluded from ever applying to the Federal Power Commission to have its rate changed if they are burdensome, or if they are unfair for one reason or another. We are merely saying that in these proceedings, in the determination of this case, it would be, we think, undesirable for this Court to enter into those matters.

I would just like to make one comment with respect to Government's Exhibit 8.

[fol. 454-670] The Court: What is it?

Mr. Lipson: That is the proposed contract that was filed with the Federal Power Commission immediately prior to the asset merger relating to the Kingsgate gas.

The reason why the Government has used that, your Honor, as a comparison to the present contract under Tab 5 of Defendants' Exhibit A is that, with all its infirmities that Mr. Harrison has just brought out, it is the closest thing that we have in this record, the closest thing that exists, to an arms' length agreement involving the Kingsgate gas, and for that reason we can only look back to it.

Certainly the agreement that is contained in Tab 5 of Defendants' Exhibit A cannot in any sense be regarded as an arms' length agreement.

Here, too, we think, that the proper—if changes are to be made with respect to proposals that have already been filed in the Federal Power Commission, those changes should be made through the normal procedures of the market to the extent that that is possible, and through the normal procedures of the Federal Power Commission.

We see no reason why regulatory methods involving natural gas rates, et cetera—this Court need interfere or concern itself with these rate matters.

This is, after all, principally a divestiture case, and it would be unduly—

[fol. 454-671] The Court: Not just "principally."

Mr. Lipson: Exclusively, your Honor.

The Court: Yes.

Mr. Lipson: We think it would be unduly burdensome on the Court certainly to begin to turn this into a regulatory proceeding.

Your Honor, I am prepared to go into some of the other matters that we have discussed, but I don't want to take away Mr. Harrison's opportunity to speak first with respect to them.

The Court: All right.

FURTHER ARGUMENT BY MR. HARRISON ON BEHALF OF EL PASO

Mr. Harrison: I have a few more comments on this, if your Honor please.

Counsel has made two propositions since I last sat down. One of them is regulation. He says that matters of rate schedules and rate regulations should be reserved to the Federal Power Commission. He apparently ignores the provision of the plan which provides that this decree shall not affect any rate, and all existing tariffs shall continue in effect. Therefore, the Court does not go into rates in this proceeding, does not go into a regulatory rate hearing in this proceeding, and everything remains just exactly as it was before.

And, in addition to that, the commitment was made here that the informal arrangement made—I have forgotten the characterization given it—to withhold application for [fol. 454-672] increased rates in certain areas for a certain time would be affirmed.

So we are not concerned with rates. The rates will remain the same, and nothing that the Court does with respect to these contracts or in this decree will affect any rates at any time, ever.

Now, counsel says, "We think that these contract questions should be decided by the Federal Power Commission."

Now, if we didn't have to enter into these contracts at all, that would be just fine. If there were any way that we could say to your Honor, "We withdraw our proposed contract for gathering," we would gladly do so. We can't withdraw it because we know that the New Company cannot function without it, and we know that we cannot satisfy the security holders without a fair gathering contract.

So he says, "You fix a contract, if your Honor please, but the principles of regulation mean that you shall fix it at a confiscatory level and not at a level which, by agreement of all parties, represents less than the cost of service. Fix it, your Honor, but fix it confiscatory and let the com-

pany struggle from then on with the Federal Power Commission with their regulatory processes."

If your Honor fixes it at all, I submit that your Honor will fix it fairly. The same reasoning applies to the problem in the Northwest.

[fol. 454-673] If there were any way of withdrawing the contract we tendered, we would withdraw it, if they don't want it, but we can't. That contract was an integral part of the plan of divestiture submitted to the security holders. The security holders depended, in accepting the security of the New Company and its assets, the commitment of El Paso to make provision for peak requirement and low period of requirement in respect to this Kingsgate gas, and so we are committed to it. We can't recede from it. But we are certainly not committed to a contract that was never made, never entered into.

Counsel says, "At arms' length." It was a contract between the parent and the subsidiary. I hardly call that an arms' length, may it please the Court. I call it virtually no contract at all, if it had ever been entered into. But it never was.

So now counsel proposes, not that this matter be left to regulation, but that your Honor pick up in its decree this confiscatory contract and impose on it and say to El Paso, "Now, go before the Federal Power Commission and try to get yourself out of this mess."

He says to your Honor, "You shall impose confiscatory obligations upon El Paso at the expense of the California and southwestern markets and for the benefit of the New Company and its markets without going to the Federal Power Commission and then let the Federal Power Com-

[fol. 454-674] mission see what they think about it."

The question has to be faced. These contracts have to be made. It seems to me they should be made on terms that are fair and just, because only fair and just contracts are in the public interest. Only fair and just contracts place the cost of doing business as between these two companies where they belong, not only as between the two

companies, but as between the rate payers in the various areas.

It seems to me that that is all there is in the problem, your Honor. The evidence is uncontradicted as to what is just and what is confiscatory, and I submit therefore our views on those two matters.

The Court: Now, are we through with the San Juan Basin problem? If we are, what do you want to discuss next? What is your next most serious criticism of the plan, Mr. Lipson?

Mr. Lipson: Your Honor, we would like to discuss the matter of tax loss carry-over.

Mr. Harrison: I think perhaps the next two most serious ones, your Honor, are the San Juan gathering agreement and the X-5 agreement with respect to the gas that we have just been discussing. I think if we have any more discussion on those, we should complete those.

Mr. Lipson: I was under the impression that counsel had completed his discussion on the matter. I had com-[fol. 454-675] pleted mine, your Honor.

Mr. Harrison: Well, that is satisfactory to us, your Honor.

I don't take any burden on the tax loss. We have nothing to do with it, your Honor.

Further Argument by Mr. Lipson on Behalf of Government

Mr. Lipson: Your Honor, the Government has a difficult time trying to understand precisely the position adopted by El Paso with respect to this tax loss carry-over matter. If I understand counsel correctly, El Paso has adopted a position that they must give back to New Company that which they acquired from Pacific Northwest.

It is uncontroverted in the record, your Honor, that during the period from 1955 through 1959 Pacific Northwest had a total tax loss carry-over of $53,820,698.99. The entire amount of this tax loss was used by El Paso during

the intervening years. This is established by the testimony of Mr. Boyd that appears at Page 254 of the transcript record in this case.

The large amount of this tax loss was due in part to the fact that Pacific Northwest had barely commenced its operations at the time of the acquisition. As a result, the large initial cost of setting up the new business far exceeded its early sales.

These initial losses, however, could have been recouped in later income-producing years as deductions from taxes [fol. 454-676] that would have been payable.

However, since El Paso has made effective use of these tax losses in order to reduce its own taxes, the New Company must pay full taxes on its future income unless the New Company is compensated for the loss of this very real and valuable asset.

In the interest of assuring that a viable New Company will be created, we think that it is important and equitable that a reserve against future taxes be set up, the amount of which would be measured in some normal accounting manner by the benefits which El Paso has obtained from the use of this asset.

Also, your Honor, as income taxes represent a cost of service recoverable from gas consumers, not only the New Company, but its gas customers, will well be prejudiced by a future tax burden unless such compensation is made.

Your Honor, there is some discussion of this in our brief, and we would just like to bring out the fact that we believe that there is a reasonable resolution possible with respect to this matter of the tax loss carried forward.

One of the possibilities that we suggest in our brief, your Honor, is that there may be created a special tax reserve that would be equal to 52 per cent of the deductions for interest and taxes which Pacific Northwest took during the '56 through '59 period. These amounts total $12,375,123.

[fol. 454-677] We know that the Federal Power Commission staff has already considered this very same matter

of the tax loss carry-over. The Power Commission, in the merger proceedings at Docket G-13018 and G-13019—the Commission issued an order dated December 23, 1959 which authorized this merger and recognized that the benefit relating to these taxes should inure to the customers and that the certificate was granted on condition that—I am quoting:

"Upon the consummation of the merger, El Paso shall establish and maintain a special reserve upon its books of account in such amount or amounts as shall equal the amount or amounts of all tax savings from deduction by the merged corporation of Pacific's past losses, less the amount which could have been used by Pacific if there had been no merger."

We are not aware that any such reserve has ever been established by El Paso. We merely suggest at this time, your Honor, that since the Federal Power Commission has evidenced an interest in this matter, we believe that its advice should be sought as to an appropriate method of allocating the benefits and burdens of this tax loss.

El Paso itself has made, so far as we can tell, no reference to this tax loss matter in its plan of divestiture. Apparently El Paso does not propose to deal with it at all. [fol. 454-678] In view of the Commission's requirement with respect to the special reserve fund that it apportion this tax benefit equitably between El Paso and Pacific Northwest, El Paso should give effect to this requirement in executing any kind of divestiture.

With your Honor's permission, I would like to go on and discuss the Government's position with respect to the Westcoast Transmission stock.

The Court: Yes, go ahead.

Mr. Lipson: This is also a difficult area in which to understand El Paso's position.

The Court: What is the name of the concern?

Mr. Lipson: Westcoast Transmission Company, Ltd., your Honor.

El Paso has taken the position that it is only required to give back to New Company those assets that New Company had at the time of acquisition. Clearly and undisputably, New Company had a substantial block of stock in this company, Westcoast Transmission, Ltd. The block at the time represented 25 per cent of the total stock in Westcoast.

Your Honor may be reminded that Westcoast Transmission is a Canadian company that brings down gas from the British Columbia area to the border states of Washington and British Columbia. As I say, it does not do business in the United States, to my knowledge, so far as the [fol. 454-679] pipeline activities are concerned, although it did, I believe in 1952, seek to obtain a certificate in competition with Pacific Northwest to serve the Northwestern area.

I understand that Westcoast Transmission is one of the principal suppliers of gas to the Northwest Division, which will be New Company.

The Court: Where does that gas come into the country?

Mr. Lipson: It comes into the country, I understand, at Sumas, your Honor, this place on the border between British Columbia and the state of Washington.

When Pacific Northwest acquired the shares of Westcoast Transmission, those shares were carried on its books at $5 a share for a total investment cost in that stock of $5,638,750.

Now, under its proposal El Paso would sell this stock at a price that would be in the neighborhood of something between 14 and 16 dollars a share.

Mr. Boyd has testified to this at Page 119 of the record.

Thus there would be a taxable profit of something between nine to eleven dollars a share over the book value at which Pacific Northwest held these shares.

By the way, the number of shares presently involved, your Honor, are 1,127,750. However, no part of the pro- [fol. 454-680] ceeds of this sale are to be given to New Company.

We think it is clear that the mandate of the Supreme Court doesn't contemplate that El Paso shall be put in a position where it can pick and choose among the assets that it acquired by selling to a third party those that it can profitably sell and transferring to the New Company the remainder.

If anything, the very minimum divestiture certainly requires that New Company be given those assets that Pacific Northwest had.

Your Honor, because the Government feels that there may be some antitrust implications in the holding of these shares of a supplier company, that is, of the holding by New Company of shares in the supplier company, or the holding by El Paso of shares in the supplier company, Westcoast Transmission, we do not insist that the stock itself be transferred to New Company as a permanent fixture. Indeed, if such a transfer was required by this Court, we would request the Court to direct that New Company dispose of this interest at a relatively early date.

But the fact that the asset may not be retained by New Company in a form of shares doesn't mean that the proceeds of the sale should inure to the benefit of El Paso. The stock was a Pacific Northwest asset and, unless El Paso is to retain the benefit of its illegal acquisition, it [fol. 454-681] seems clear that the proceeds of the sale of this stock should be transferred to New Company.

Indeed, I just read to your Honor before the language of the Supreme Court in the duPont case that makes it appear improper to allow one who violated the antitrust laws to retain the benefits of the violation.

Aside from what we think to be the obvious equity of allowing New Company to obtain the proceeds of the sale of Pacific Northwest's assets, it is clear from the record, too, that these very proceeds would enable New Company to begin operations with a cash asset of about 12 million dollars and would, thereby, eliminate the necessity for New Company to go to the market place immediately upon

divestiture to contract for additional debt merely in order to raise working capital.

Your Honor will recall that the El Paso proposal as presently set up contemplates that New Company, at its inception, will increase its debt by five million dollars by obtaining just such a bank loan.

With respect to the Westcoast Transmission shares, your Honor, there has been some discussion of the fact that at the date when El Paso acquired Pacific Northwest the Westcoast shares were being traded at a market—traded on the market at a value higher than the presently existing value.

El Paso apparently believes that, because the shares have fallen in value, it is entitled to receive compensation for [fol. 454-682] this. I think that this is a novel matter, your Honor. Certainly El Paso cannot receive compensation for having performed an unlawful act in the first place, and, if the shares have gone up or gone down in the interim, I cannot understand why El Paso should receive the benefit of those market fluctuations.

The Westcoast Transmission stock should be turned over to New Company at the present value and with a requirement, of course, that they be sold within a reasonable time thereafter, and the proceeds should, of course, be allowed to inure to the benefit of New Company.

With your Honor's permission, there is one other item I would like to bring to the Court's attention with respect to the capitalization of New Company.

As we understand it from Defendants' Exhibit A, Tab 1, El Paso proposes to transfer to New Company assets equal in value to $243 million dollars.

New Company will thereafter have a capitalization of a roughly equivalent amount.

The capitalization of New Company will consist of $185 million dollars in long-term debt, of which 180 million will be assumed from El Paso. The five million, I understand, will be the bank loan that I referred to earlier.

The remaining capitalization of New Company will consist of an equity capital established on the books of New [fol. 454-683] Company at a figure of $63,200,742.

Adding together the debt to be assumed from El Paso of 180 million, and the equity capitalization of the 63 million dollar figure, we arrive at a figure roughly equal to the assets to be transferred to New Company. In other words, both sides of the balance sheet balance.

However, Mr. Boyd has testified that, should El Paso distribute New Company shares through the device of a rights offering to the El Paso shareholders, in that event El Paso would expect to receive something between 107 million dollars and 108 million dollars before taxes. His testimony concerning this appears in the transcript at Page 152.

Now, according to Mr. Boyd's testimony, this sum would represent the market value of the shares of New Company, yet it certainly appears, at least, that, if the stock of New Company is valued by the market in excess of the book capitalization of 63 million dollars, then some good argument, we think, can be made for the fact that New Company, not El Paso, should receive the excess of the market value over the book value of its own capital stock.

If New Company were established as an independent entity and allowed to float its own capital stock, it would naturally receive the difference of roughly 45 million dollars between the book value and the market value of its shares, and in that case the book value would probably [fol. 454-684] have to be increased on the books.

I am no accountant and I really can't speak with authority on that point.

[fol. 454-685] However, El Paso has not made any showing whatever to justify El Paso's retention of that profit on the issuance of New Company shares; and since the sums are substantial, we think it should be brought to this Court's consideration.

Instead, El Paso has stated categorically that the proceeds of the sale of New Company's shares—and I'm quot-

ing from Mr. Boyd's testimony at page 143 of the record—"won't be divided at all."

The only purported justification for this failure to account to New Company for any part of the profits of underwriting the New Company shares is Mr. Boyd's statement that appears at page 153 of the transcript, where he stated: "El Paso Natural Gas Company paid for the assets of Pacific Northwest. Now we're required to divest them. When we sell them, we expect, of course, to retain the results of that sale."

Thank you, your Honor.

Mr. Harrison: I think, if your Honor please, that we would like to consider on the part of the defendant whether we wish to put any further evidence on on these last three points. I would like to suggest to your Honor that we have a recess to make that determination and return this afternoon.

The Court: All right. We'll come back to 2:00.

(Whereupon Court was in recess until 2:00 p.m. of the same day.)

[fol. 454-686] Afternoon Session

December 11, 1964, 2:00 p.m.

Mr. Harrison: We think we require no further evidence, your Honor, and are prepared to proceed.

The Court: Go ahead with whatever you want.

Further Argument by Mr. Harrison on Behalf of El Paso

Mr. Harrison: First, we treat the proposed transfer of the West Coast Transmission stock to the New Company as against the proposal contained in the plan of divestiture that it shall be sold by El Paso within a limited period of time. This ultimately resolves itself, may it please the Court, into simply a demand by the Government that the El Paso Natural Gas Company transfer to the New Company an additional some $50 million.

I say that because it is conceded that it would be illegal and contrary, according to counsel for the Government, for the New Company to hold this West Coast Transmission stock. And, therefore, the sole purpose of causing this transfer is to have it sold by West Coast, instead of by El Paso.

And I assume it would be equally illegal in the hands of any would-be purchaser of the assets to hold the stock; and so it would sell the stock, and the proceeds therefor would go into the treasury of the New Company.

This, therefore, is simply a question of who retains the proceeds.

[fol. 454-687] Here again, we run into the entire plan of divestiture, the plan of divestiture which calls for the transfer of $273 million of assets, or $243 million, or thereabouts, in net value, net book value.

It ignores, again, the proposal to transfer some $70 million of assets which they never had and never would have had. It ignores many other favorable factors of this proposal and simply states that the New Company should have these additional funds.

Now, as respects the Supreme Court decision, we were ordered to divest. We were not ordered to divest to some particular company. We were not ordered to divest to the New Company. We were ordered to divest as the District Court should determine, and our proposal is to divest. Therefore, it's in complete compliance with what the Supreme Court requires.

Now, throughout these proceedings great concern has been shown by the Attorney General with respect to the financial strength of the New Company. We believe, the creditors of El Paso believe, that the plan proposed by El Paso creates a strong, viable company, one that satisfies all the requirements of the security creditors and upon the record in this case one that will enjoy satisfactory earnings and will have adequate capital, will be a strong company to serve the Northwest markets and vie for other markets in the future.

[fol. 454-688] But somehow the Attorney General and counsel seem to completely ignore that El Paso is supposed to continue in business, too, that El Paso is required to serve certain markets of California and the Southwest, and that it, too, perhaps should have the right to compete.

I fail to recall any consideration in this entire hearing on the part of the Attorney General respecting protection of the financial integrity of El Paso and its ability to continue to serve its markets and to aspire to its future opportunities for business.

As to the suggestion that the retention of this stock would offend Section 7 of the Clayton Act and should not be permitted because thereby a profit would be made out of an illegal transaction, may I point out to the Court that in the duPont case, which counsel relies upon so much, in which divestiture was directed to the shareholders, the Supreme Court did not require any penalty. It did not say that anything should be disposed of by way of book value or otherwise. That stock was distributed to all of the stockholders of duPont, the acquiring company, the holding company, including its principal stockholders.

The order even made provision for the sale by the Christiana Company and its companion company, the name of which slips me—I think it was the Delaware—to sell sufficient of the stock to pay its capital gains tax on the [fol. 454-689] distribution. And then it, as well as all others, were to receive their shares without any penalty or deduction, without any requirement that they should yield their dividends received in the past, for example; and thereafter, Congress passed an act, being of the opinion that not even the capital gains tax should be imposed.

And so they received their value, their market value at that time—received their shares, the market value they received without any tax whatever. And I know of no case, and I challenge counsel to find any, in any District Court, in any Circuit Court, or in the Supreme Court where a decree was directed which would compel an acquiring company to dispose of its assets at less than their fair value

upon the ground that they would not be permitted to make a profit.

Now, the truth of the matter is here, as the evidence shows, that El Paso will not obtain a profit from the sale of this stock, but instead will suffer a heavy loss. This stock was acquired on January 2, 1957; at a value of $29 a share, or a total of $32,704,000.

It was taken in, however, on January 1, 1961, on the books of El Paso at a tax base of $5. Now, this tax base of $5 had no relationship, may it please the Court, to the value of the stock at that time or at any time before or since.

[fol. 454-690] For tax purposes the company was only allowed to use that as a tax base, because that was the original cost of Pacific Northwest before its stock was acquired by El Paso. And so, if it is sold at the present time, it will result in a loss of some $4 million, together with a capital gain tax payable of $2,500,000; and the total loss will be $6,500,000. However much the Attorney General wishes to penalize El Paso, this should be a sufficient penalty in this instance.

However, Mr. Lipson makes some contention—and I must confess, having I believe made it only this morning—which goes much further. And he says: "You are permitted under the law in a Section 7 divestiture only to retain book value."

Just where the balance of the money would go, I don't know. The theory seemed to be that having once taken this asset in on the books of the company at $5, because that was the tax base from which the company must work, it can only retain $5 of the market value of $15 a share at the present time.

Knowing no precedent for the more moderate claim made here, I certainly know of no precedent for such a penalty. I know of no rule or principle which requires an acquiring company at a divestiture proceeding to divest any assets at other than their fair value at the time they are disposed of.

[fol. 454-691] Now, another strange contradiction in the position of the Government is this. It inveighs vigorously against the proposal of El Paso to sell this stock; and yet, its fundamental case is based upon the proposition that we shall sell everything. And so if we shall sell everything, it is a little difficult to see why they object to this particular manner of selling these shares.

It would be interesting to know whether, when they reveal their entire purpose, they would claim that we were going to have to sell to somebody at book, without regard to the present value of the properties to be sold.

Some reference was made to the fact that the assets being transferred to the New Company stand on its book at a book which was the book of the transferring company. That again results from tax matters, tax problems, problems of rate making, and is no indication of the true value of the underlying assets at all. Any claim that book value and market value are the same violates all the knowledge of the marketplace, as well as all legal knowledge.

Has this Court ever heard of a condemnation case in which it was suggested that the value to be imputed to the property condemned was book value? I believe that value is even excluded from the evidence.

In short, then, we assert that it is wholly improper to attempt to exclude this question of West Coast Transmission [fol. 454-692] stock and its disposal from the overall plan. We submit that no evidence has been submitted by the Attorney General to contradict the clear showing that the New Company is adequately equipped to carry on and perform its public service and vie for future opportunities.

The simple matter is that this sale by El Paso of the stock of West Coast Transmission is part of a total plan which has appealed to the creditors of El Paso as entirely fair and just and as part of the plan which is necessary to keep El Paso in a financial condition able to assume the obligations secured and that are allocated to it in the division of debt.

We now pass to the question of what is called tax loss carryover. I find myself having a little difficulty in discussing the matter of tax loss carryover, because the concept to me is extremely elusive. I have a great deal of difficulty understanding what is meant by tax loss carryover as an asset. I would think that the Attorney General would agree with me that a loss is not an asset and that when a company acquires another with losses, it doesn't acquire assets, at least in respect to the losses.

This matter of tax loss carryover is simply the result of one provision of the Internal Revenue Code, which provides for a certain type of deduction for a limited period from gross income in determining net income for tax pur- [fol. 454-693] poses. A brief review of the Internal Revenue Code will show that this is only one of the multiplicity of provisions concerning deductions for the purpose of determining the obligation to pay income taxes to the United States.

All the various types of costs of doing business enter into that question before one can determine what the obligation to the United States year by year may be. And that obligation is to the United States.

If the United States should change the law or if we should misinterpret the law, and if the United States should contend that we owed more to the United States, this we could understand; but to say that because El Paso Natural Gas Company after the merger, or before, did not pay more taxes to the United States it should make a further contribution to the assets of the New Company is based upon some theory which escapes me.

But this much is clear, and that is that whatever this thing may be and whatever it may mean, it is only one factor which enters into what is the net income of the taxpayer at the particular time. And that means El Paso.

It means that when we deal with the subject of a tax deduction, we are dealing with what is or will be or what has been the net income of El Paso. And if the Attorney General can reach into the past income of El Paso to extract

therefrom a portion of its net income, measured by this [fol. 454-694] so-called tax deduction, then it can dip into that income for any purpose, and it can invade that income to absorb it all.

This sort of a deduction is no different from an interest deduction. And when this company was acquired, in consolidated returns, and later in the El Paso return, the interest on the debt attributable to the Pacific Northwest was deducted.

Well, that was a cost. To the extent it was a cost, it was a loss. Do we owe them that?

And look at this income problem again. After El Paso took this company over, certainly after the merger, this became a single enterprise. The income of El Paso was adequate. The income of Pacific Northwest, and later of the Northwest Division, was inadequate, because its return was inadequate; and the result was that Pacific Northwest enjoyed the benefits of the greater income of El Paso to build its system, to build its market, and to be able today to turn over the assets which are proposed. So one cannot segregate from the total income of the joint enterprise some item such as this and say, "Give it to us in cash."

And that is all this is, a naked request for additional cash. Again, it enters into the question of whether the plan provides adequate resources to the New Company to accomplish its purpose; and all of the evidence is that it is [fol. 454-695] adequate to that purpose.

I do not know how this Court could possibly evaluate what would have happened with reference to the income of Pacific Northwest in the past eight years had it remained separate. I do not know how this Court could refashion something in the way of an imaginary financial picture and write imaginary income tax returns to know what Pacific Northwest would have accomplished; but I suggest to you it is much better off today financially, and the New Company is much better off today financially, because they were a single enterprise during this period.

Finally, let me point out that these income tax returns, being consolidated returns, until 1960 and single corporate returns thereafter, that the Pacific Northwest system contributed jointly with El Paso to the enjoyment of whatever benefit the tax loss carryover provided, for it entered into the total income of the entire system, related to the total income of the entire system, and the total income of the entire system went to the support of the Pacific Northwest, as well as the balance of the El Paso facilities.

I submit to the Court that when all is said and done, the Government, the longer these proceedings go, get apparently more aggressive with reference to their attitude to El Paso. I have heard not even faint praise for any of the proposals which were under consideration for so long. [fol. 454-696] In respect to the plan for divestiture to the share holders, I have not even heard a single counter suggestion that might satisfy the United States that such a plan could succeed in accomplishing the Supreme Court's purpose.

The position is rigidly and unalterably that nothing of this sort can be done. The opposition to the plan in general seems day by day to develop even more objections than we began with.

I would hope that the Attorney General would review this whole picture, take another good look at it, approach it sympathetically, and perhaps come forward with some suggestions which will enable us to carry through this proposed divestiture at the earliest possible moment.

Mr. Lipson: We have no further argument, your Honor.

STATEMENT BY MR. HARKAWAY ON BEHALF OF THE FEDERAL POWER COMMISSION

Mr. Harkaway: Your Honor, if I might be heard. I'm William Harkaway with the Federal Power Commission.

The Court: Yes, sir.

Mr. Harkaway: I think it might be appropriate to speak.

The Court: Come forward.

Mr. Harkaway: If your Honor please, I think we have been referred to a few times by both parties to this proceeding, and it might be proper for me to make a few comments at this time.

It certainly is clear that this Court has to ultimately [fol. 454-697] decide the divestiture issues in this case by its final decree. I think it is also clear, and it's been admitted by all parties to this proceeding, that there must be a filing with the Federal Power Commission for a certificate of public convenience and necessity by New Company in order to acquire and operate the facilities New Company would have to operate.

It is not so clear, but probably true, that El Paso would have to file an application to abandon such facilities as it would abandon under Section 7(b) of the Natural Gas Act.

Now, the Commission is in hope, and I feel it certainly can be worked out, that there would be some solution that could ultimately serve the purposes of both the Court and the Commission. At this present juncture it would seem that there is a broad division of opinion by the parties to this case as to what is required by the Court in its divestiture order.

El Paso has presented a plan which is at this stage apparently unacceptable to Justice. Justice in the alternative has indicated the possibility of a sale, or, as I read their argument, the possibility of a Reading type solution. The Reading case is referred to in their brief.

This is a matter which we feel is totally and completely within your Honor's domain and for which the Commission can be of little, if any, help.

[fol. 454-698] However, there are procedures which must be followed. We feel an interlocutory order of this Court will be necessary in order to allow the Federal Power Commission to exercise its jurisdiction over the certification of the New Company; and in the exercise of that jurisdiction, it is entirely possible that the Commission could help your Honor in determining factual questions that are before the Court.

I refer specifically to the issues that have been raised here today and earlier this week.

Some of the questions we feel are appropriate for the Commission's consideration, or may be appropriate. Some of them we feel are inappropriate. The question of the manner of divestment, which I refer to, and which the parties have argued at length over, is not a matter which the Commission would have to determine. This is something for your Honor to consider.

The question of the gathering contracts and the rates to be charged therein is certainly a matter which the Commission will concern itself with. Whether or not it will do so in the manner which Justice suggests, the filing of the original contracts with a rate filing by the New Company and El Paso for the increased rates, or whether or not the Commission would consider it in a certificate application under its power to attach such terms and conditions as are reasonably necessary in the public interest, is a matter which [fol. 454-699] the Commission ultimately could determine.

We feel that we have adequate authority under either the certificate power or the rate power to assure that the public pays no more than a just and reasonable rate for the service which is going to be rendered by El Paso on one hand and Pacific Northwest—or New Company—on the other.

With regard to the Kingsgate contract, it's noted—and I followed this as closely as I could in the argument—that El Paso plans to institute a new contract for the sale of Kingsgate gas to El Paso by New Company in decreasing amounts. It's also noted in the divestiture plan that New Company would not raise its rates and would have adequate income so they would not have to raise their rates. Part of the income depends upon the moneys received from El Paso in the making of this Kingsgate sale.

It's certainly true, as Mr. Harrison has indicated, that El Paso would have to continue, to some extent at least, the terms of this Kingsgate contract in order to satisfy the security holders. I feel that it probably is true that some arrangement would have to be made to assure that New Company has adequate markets, including the sale to El

Paso, or some other arrangement, to assure that it had adequate income to meet a fair return in order that its rates not be increased. Some arrangement will have to be arranged. Whether or not it's the Kingsgate contract El Paso [fol. 454-700] proposes, or some other Kingsgate arrangement, or some other arrangement totally different than anyone here presented, it would have to be presented in a certificate application before the Federal Power Commission.

The Commission has the authority under the cases, we feel, to consider alternative proposals that are presented to it in any certificate case, to find out if the purposes of the act can be met by some more desirable alternative than is presented by a particular applicant.

We feel that when the certificate matter comes before the Federal Power Commission, the details of any contract, the details of any market proposal, and the details of any financial structure would be reviewed by the Commission.

Considering the financial structure that both Mr. Lipson and Mr. Harrison have discussed today, it is the Commission's concern, of course, that the company which would be established would have adequate financing, would be a viable, solid company, capable of rendering service to its markets.

Past Commission policy has indicated that where the indebtedness does not exceed 75 per cent of the total financial structure and the equity would cover the remainder, that the Commission requirements have been met. Precisely what would be done in this case, which is certainly not a normal case before the Federal Power Commission, I could [fol. 454-701] not say at this time; but if past policy were to be relied upon, this division of debt and common equity would probably be the approach the Commission would take.

With regard to the West Coast Transmission Company stock and the tax loss carryover, I feel that these are items which are peculiarly before this Court, and not before the Commission. These are the matters of divestment of assets—questionably assets—which were acquired from Pa-

cific Northwest by El Paso, and in returning them to New Company I feel they would not affect the rate structure insofar as the rate payer would have to see to payment of higher rates or lower rates, depending upon whether or not the company is strengthened by the receipt of this asset.

The Commission will review all of the factual aspects of the divestment proposal as it is presented in an application to it. It will try to the best of its ability to answer any questions your Honor might have and might pose to it.

I cannot say flatly that it will answer all of the questions. It has certain statutory powers which it must stay within, but it certainly will do its best to meet any questions that your Honor might pose.

Unfortunately, any application before the Federal Power Commission takes time. I recognize that the Court, the Supreme Court, ordered divestiture without delay. I'm [fol. 454-702] sure that it did not mean without delay without consideration of the factual matters to be determined.

Any application before the Federal Power Commission would certainly be processed as rapidly as possible, giving due consideration to the interests of intervenors, who under the questions of due process would have a right to be heard on particular aspects of these applications.

I can assure your Honor that we would move as rapidly as is humanly possible.

If you have any questions, I'll be happy to try to answer them.

The Court: Not at this juncture.

Mr. Harkaway: Thank you, your Honor.

The Court: Thank you. Is there anything further this afternoon?

Mr. Lipson: The Government has nothing further, your Honor.

Mr. Harrison: We have nothing further, your Honor.

The Court: All right. Now, this is December 11. Two weeks from today is Christmas. I want some time to digest some of the matters that have been presented here, as much of it as I can, before you get back.

As I suggested to you in chambers this morning, I think it would be desirable to recess these hearings until Monday, the 4th day of January.

[fol. 454-703] Mr. Harrison: Your Honor, if it would be equally—

The Court: Yes. That's 1965. Pardon me?

Mr. Harrison: Would it be equally convenient, your Honor and counsel, if it were set for the following day?

The Court: It's all right. I just suggested that. Perhaps I ought to have asked you, and I now ask you what would be the most convenient day for you to appear.

Mr. Harrison: Well, in my particular instance, it would be more convenient the following day.

Mr. Lipson: The Government would have no objection to that, your Honor. The 5th.

The Court: All right. Let's start Tuesday, the 5th of January, then.

Very well. A very pleasant holiday to you, all of you. I'll see you in January.

(Whereupon Court was adjourned until Tuesday, January 5, 1965 at 10:00 a.m.)

[fol. 455]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

Judge Ritter

[Title omitted]

C 143-57

MINUTES—December 2, 1964

This matter came on before the court at 10:00 a.m. for hearing on proposals for divestiture and motions to intervene.

Larry L. Williams, Esq., Jack L. Lipson, Esq., Lawrence F. Noble, Esq., Antitrust Division, Department of Justice, William T. Thurman, Esq., U. S. Attorney, appeared for the plaintiff.

Gregory A. Harrison, Esq., Robert S. Daggett, Esq., Atherton Phleger, Esq., Leon M. Payne, Esq.; and Dennis McCarthy, Esq., appeared for defendant El Paso Natural Gas Company. A. H. Nebeker, Esq., appeared for defendant Pacific Northwest Pipeline Company.

Richard A. Solomon, Esq., and William I. Harkaway, Esq., appeared amicus curiae, on behalf of the Federal Power Commission.

The following counsel appeared for applicants for intervention: William M. Bennett, Esq., State of California; Richard W. Sabin, Esq., State of Oregon; Robert E. Simpson, Esq., Washington Utilities & Transportation Commission; M. Allyn Dingle, Esq., Idaho Public Utilities Commission; H. Wright Volker, Esq., Public Service Commission of Utah; A. Fred Miller, Esq., Public Service Commission of Wyoming; Richard E. Tuttle, Esq., Public Utility Commission, State of California; Robert L. Simpson, Esq., The Washington Water Power Company; Richard B. Hooper, Esq., Cascade Natural Gas Corporation; John W. Chapman, Esq., Washington Natural Gas Company; A. W. Sandack, Esq., Washington Natural Gas Company; Harold W. Pierce, Esq., and Rex J. Hanson, Esq., Northwest Natural Gas Company; Joseph S. Jones, Esq., Mountain Fuel Supply Company; C. Keefe Hurley, Esq., Earle C. Cooley, Esq., Calbin W. Rawlings, Esq., Brigham E. Roberts, Esq., Paradox Production; Malcolm H. Furbush, Esq., Pacific Gas and Electric Company; Edward F. Richards, Esq., Utah Gas Service Company; Roger J. Nichols, Esq., Southern California Gas Company and Southern Counties Gas Company of California; Claude Marcus, Esq., Intermountain Gas Company.

Also present was Paul B. Cannon, Esq., representing Pacific Western Pipeline Corporation.

Kenneth Handley, Esq., moved the admission of Malcolm Furbush, Esq., Roger J. Nichols, Esq., and Richard Tuttle, Esq., for the purposes of this case only. Motion granted.

William Volker, Esq., moved the admission of A. Fred Miller, Esq., for the purposes of this case only. Motion granted.

Richard Sabin, Esq., on behalf of the Public Utilities Commission of Oregon, made statements to the court.

[fol. 456] Robert E. Simpson, Esq., on behalf of Washington Utilities and Transportation Commission, made statements to the court.

Keith Sohm, Esq., representing Utah interests, made statements to the court.

Allyn Dingle, Esq., on behalf of Idaho Public Utilities Commission, made statements to the court.

John Chapman, Esq., and A. W. Sandack, Esq., of Washington Natural Gas Company, made statements in behalf of petition to intervene.

Brigham E. Roberts, Esq., and C. Keefe Hurley, Esq., moved that the application to intervene of Paradox Production heretofore submitted be withdrawn and in lieu, requested permission to appear as amicus curiae.

Joseph Hones, Esq., on behalf of Mountain Fuel Supply Company, made statements to the court in support of petition to intervene.

Paul B. Cannon, Esq., for Pacific Western Pipeline Corporation, made statements to the court.

Larry Pankonien, Esq., on behalf of Tennessee Gas Transmission Company, stated that he was an interested observer, not of record.

Robert L. Simpson, Esq., on behalf of Washington Water Power Company, made statements to the court in support of petition to intervene.

William M. Bennett, Esq., representing the State of California, made statements to the court in support of petition to intervene.

Harold Pierce, Esq., and Rex J. Hanson, Esq., representing Northwest Natural Gas Company, made statements to the court on behalf of petition to intervene.

Edward F. Richards, Esq., appeared on behalf of Utah Gas Service Company, and made statements in support of petition to intervene.

[fol. 457] Richard A. Solomon, Esq., Howard E. Wahrenbrock, Esq., and Joel Yohalem, Esq., of the Federal Power Commission, were allowed to participate as amicus curiae.

Richard B. Hooper, Esq., on behalf of Cascade Natural Gas Corporation, made statements to the court in support of petition to intervene.

Roger J. Nichols, Esq., on behalf of Southern Counties Gas Company and Southern California Gas Company, made statements to the court in support of petition to intervene.

Richard E. Tuttle, Esq., Public Utilities Commission of State of California, made statements to the court in support of petition to intervene.

A. Fred Miller, Esq., representing Wyoming Public Service Commission, requested permission to appear as amicus curiae.

Malcolm H. Furbush, Esq., representing Pacific Gas & Electric Company, made statements to the court, in support of petition to intervene.

Claude Leggett, Esq., representing Intermountain Gas Company of Idaho, made statements to the court in support of petition to intervene.

Wright Volker, Esq., representing Public Utilities Commission of the State of Utah, made statements to the court in support of petition to intervene.

Gregory A. Harrison, Esq., recalled Mr. Paul Kayser to the stand. Defendants' exhibits B, C, D, and E were marked, offered and received.

The hour of 12:00 p.m. having arrived, court adjourned until 2:00 p.m.

At 2:00 p.m. Mr. Kayser resumed the stand and testified. Defendants' exhibit F was marked, offered and received. Defendants' exhibit G was marked and offered.

Government's exhibit No. 1 was marked and offered.

Mr. Howard Boyd was recalled to the stand and testified.

A large colored map exhibited in the courtroom was referred to by the witnesses. Court recessed at 4:00 p.m., to resume at 10:00 a.m., December 3, 1964.

DECEMBER 3, 1964

Court reconvened at 10:00 a.m. with counsel present as heretofore indicated. Mr. Howard Boyd resumed the stand and was questioned.

Defendants' exhibit H was marked, offered, and read into the record by the witness. Defendants' exhibit I was marked, offered and received.

Plaintiff's exhibits Nos. 3, 4 and 5 were marked, offered and received.

The hour of 12:00 p.m. having arrived, court recessed until 2:00 p.m.

[fol. 458] Court resumed at 2:00 p.m. with counsel as heretofore indicated present.

Alvin J. Rowe was called by the plaintiff and was sworn and testified. Plaintiff's exhibit No. 6 was marked, offered and received.

Howard Boyd resumed the stand.

Plaintiff's exhibit No. 3 was substituted and three (3) pages accepted in lieu thereof. Plaintiff's exhibit No. 7 was marked, offered and received. Plaintiff's exhibit No. 8 was marked and offered.

At 4:00 p.m. court adjourned until Friday, December 4, 1964 at 10:00 a.m.

DECEMBER 4, 1964

Court reconvened at 10:00 a.m. with counsel present as heretofore indicated.

Howard Boyd resumed the stand.

Plaintiff's exhibit No. 8 was received.

Defendants' exhibits J and K were marked, offered, and received.

Mr. Lipson made an opening statement to the court on behalf of the plaintiff.

The hour of 12:00 p.m. having arrived, court recessed until 2:00 p.m.

At 2:00 p.m. court reconvened with counsel present as heretofore indicated. Mr. Boyd was recalled to the stand. Plaintiff's exhibits No. 10 and No. 11 were marked, offered, and received.

Defendants' exhibit F was marked, offered, and received.

George F. Hess was called by the plaintiff and was sworn and testified. Plaintiff's exhibits Nos. 12, 13, 14, 15, 16 and 17 were marked, offered and received. Plaintiff made a proffer of proof and upon objection of counsel for the defendant, objection was sustained. Upon stipulation of counsel, Mr. Hess was excused and court adjourned until December 8, 1964 at 10:00 a.m.

DECEMBER 8, 1964

Court reconvened at 10:00 a.m. with counsel present as heretofore indicated. Court advised counsel that the applications to intervene were denied and also amendments to said petitions to state proceedings denied.

Plaintiff's exhibit No. 18 was marked, offered, and received.

[fol. 459] Plaintiff's witness, Roy Riggs, Jr., was sworn and testified. Plaintiff's exhibit No. 19 was marked and

offered. Court deferred ruling upon the admissibility of exhibit No. 19. The government's offer to produce evidence relative to the interest of third party companies for a plan of divestiture was denied.

The hour of 12:00 p.m. having arrived, court recessed until 2:00 p.m.

At 2:00 p.m. court reconvened with counsel present as heretofore indicated. Mr. Boyd was recalled to the stand by the plaintiff and questioned.

Defendants' exhibits L and M were marked, offered, and received.

At 2:50 p.m. court adjourned until December 9, 1964 at 10:00 a.m. in order to permit counsel to prepare memorandums.

DECEMBER 9, 1964

Hearing resumed at 10:00 a.m. with counsel as heretofore listed present.

Statements of Mr. Harrison were heard.

The hour of noon having arrived, court recessed to 2:00 p.m.

Court reconvened at 2:00 p.m. with counsel present as heretofore listed.

Statements of Mr. Lipson were heard.

The hour of adjournment having arrived, court recessed to Thursday, December 10, 1964 at 10:00 a.m.

DECEMBER 10, 1964

Hearing resumed at 10:00 a.m. with counsel present as heretofore indicated.

Mr. Riggs resumed the stand. A re-offer was made of exhibit No. 19, by the plaintiff.

Defendants' exhibits Nos. N, O, P and Q were marked.

The hour of noon having arrived, court recessed until 2:00 p.m.

At 2:00 p.m. court reconvened with counsel present as heretofore indicated.

Mr. Lipson moved to withdraw exhibit No. 19 and the motion was granted.

Government rested except as to the proposal of the rights of third parties to submit plans of divestiture. Court reserved its ruling thereon.

[fol. 460] A. M. Derrick was called by the defendant and was sworn and testified.

Both counsel thereafter advised the court that they had finished their argument and had no further evidence at this time. Plaintiff submitted a memorandum to the court and filed the same with the clerk relative to the power of the court to make modification of contracts in relation to indebtedness in the divestiture proceedings.

Mr. Harrison and Mr. Lipson, respectively, addressed the court relative to the San Juan reserve. The court requested Mr. Harrison to secure the financial record of Mr. Fish and the Pacific Northwest Pipelines Company at the time of acquisition by El Paso.

The hour of 4:00 p.m. having arrived, court adjourned until Friday, December 11, 1964, at 10:00 a.m.

DECEMBER 11, 1964

Hearing resumed at 10:00 a.m. with counsel present as heretofore indicated. Mr. Harrison continued his statements to the court and Mr. Lipson spoke in response thereto. The question of tax loss carry over was submitted to the court.

The hour of noon having arrived, court recessed to 2:00 p.m.

At 2:00 p.m. court reconvened with counsel present as heretofore indicated. Mr. Harrison resumed his statements to the court.

Mr. William Hathaway of the Federal Power Commission addressed the court.

Counsel having indicated that they had nothing further at the present time to present, the matter was continued to January 5, 1965 at 10:00 a.m.

JANUARY 6, 1965

Hearing resumed at 10:00 a.m. with counsel present as heretofore indicated. Mr. Lipson filed a memorandum of authorities. Counsel met in chambers relative to the divestiture plan and the court directed that the case be continued until 2:00 p.m.

Court convened at 2:00 p.m. and counsel requested permission to confer until 2:30 p.m.

At 2:30 p.m. with counsel present as indicated, Mr. Harrison stated that the plaintiff and the defendant had been in discussion relative to certain issues and moved that the case be continued until January 18, 1965 in order to enable counsel to have further consideration. Motion granted.

AJB:ds

[fol. 460a]

cc:

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[fol. 461]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

[Title omitted]

Civil No. 143-57

REQUEST FOR RULING UPON PETITION TO INTERVENE BY THE STATE OF CALIFORNIA PURSUANT TO RULE 24(a)(2), 24(a)(3) AND 24(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE, OR A STAY OF THE PROCEEDINGS HEREIN PENDING SUCH RULING—Filed December 8, 1964

Comes now the State of California which has heretofore filed a petition to intervene in these proceedings relying upon Rules 24(a)(2), 24(a)(3) and 24(b)(2) of the Federal Rules of Civil Procedure and requests the court to rule upon such petition and to grant it;

California points out that there have been four days of hearing thus far in these proceedings and that witnesses and evidentiary material has been presented herein. California is unable to protect its rights by way of examination of witnesses and by way of presentation of any testimony that may be required as these proceedings develop. Accord-

[File endorsement omitted]

ingly, California requests that intervention be ruled upon and that it be granted and that in the event no ruling is [fol. 462] made that these proceedings be stayed so that California may pursue further relief as provided by law.

Respectfully submitted,

William M. Bennett, Special Counsel for The People of the State of California.

[fol. 463]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

[Title omitted]

Civil Action No. 143-57

MOTION OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA FOR LEAVE TO INTERVENE AS AMICUS CURIAE —Filed December 14, 1964

To the Honorable Judge of the Above-Entitled Court:

The Public Utilities Commission of the State of California (California PUC) respectfully moves the Court for leave to intervene as *amicus curiae* in the above-entitled proceeding and in support of its motion states as follows:

1. The California PUC is an administrative agency created by the Constitution of the State of California; it supervises and regulates natural gas distributing utilities within the State of California, exercising general regulatory supervision over the rates and charges which must [fol. 464] be paid by California consumers. (California Constitution, Article XII, Sec. 22.)

[File endorsement omitted]

2. California natural gas distributing utilities purchase from El Paso Natural Gas Company (El Paso) over seventy per cent of the natural gas they sell in the California market. In 1963 El Paso sold 719,306,177,000 cu.ft. of natural gas to the California utilities at a price of $231,709,082.53. (Annual Report of El Paso Natural Gas Company to Federal Power Commission for Year Ending December 31, 1963, FPC Form #2, Sales for Resale—Natural Gas, Account 483, pp. 521-522).

The cost of this gas is passed on to over 4,000,000 ultimate consumers within the State of California. To protect these consumers against the burden of excessive costs, the California PUC represents them in numerous proceedings before the Federal Power Commission (FPC), *amicus curiae* herein, which involve El Paso's rates, facilities and contracts.

3. Federal courts may avail themselves of *amici curiae* to represent the public interest in the administration of justice. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580-581 (1946). *Amici curiae* may be permitted to participate in trials and to present arguments and file briefs. *Durkin* v. *Pet Milk Co.*, 14 F.R.D. 374, 381 (1953). Participation in anti-trust litigation as *amici curiae* is permissible. *United States* v. *Loew's, Inc.*, 136 F. Supp. 13, 14 (1955).

4. This Court has allowed the FPC to intervene as an *amicus curiae*. However, the interests the FPC represent [fol. 465] in this proceeding are separate and distinct from those of the California PUC.

FPC jurisdiction is limited to the transportation of natural gas in interstate commerce, its sale in interstate commerce for resale, and natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Co.* v. *P.U.C. of Indiana*, 332 U.S. 507, 516-517 (1947). FPC jurisdiction does not completely occupy the field of natural gas regulation, but covers only those areas which cannot be regulated by the individual states. State regu-

lation of natural gas was not supplanted by federal regulation.

The significant role of state commissions is recognized in the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821-833 (1938), 15 U.S.C. §§717-717w (1958)), which specifically provides for their participation before the FPC. (See sections 1(c), 2(8), 4(e), 5(a), 5(b), 9(a), 9(b), 13, 14(a), 15(a), 17(a), 17(b), 17(c), and 19(a)). Under such provisions the California PUC has appeared before the FPC and has sometimes taken positions contrary to those of the FPC staff. The interests of the California consumer may require, as in this case, representation separate from that provided by the FPC. Such independent representation by California will present information that may be of assistance to the Court in reaching its decision.

The FPC's participation as *amicus curiae* is premised on broad regulatory principles. (See Statement of the Federal Power Commission, *Amicus Curiae*). The California PUC's participation as *amicus curiae* would be based on the direct interest of the California consumer (El Paso's largest customer) in the effect that this divestiture, and the disposition of El Paso's property, contracts and services, will [fol. 466] have upon El Paso's continued capacity to provide reasonable service to the California market.

5. The evidence in this case covers alternative plans respecting the separation of physical properties and the segregation of natural gas reserves in the San Juan Basin of New Mexico and Colorado. The San Juan Basin is a principal source of supply for El Paso, and gas reserves from this area, through El Paso's facilities, are now in effect committed to the California market, and will be available to meet California's growing needs. El Paso's ability to serve this expanding market depends upon its continued ownership of sufficient reserves from this area.

The California PUC is obligated to the consumers of California to take the necessary action to assure that adequate supplies of gas are available for the expanding Cali-

fornia market. The California PUC knows better than other participants the present and future requirements of the California market; it has also studied El Paso's reserve situation and, consequently, is prepared to assist this Court, both legally and technically, in the resolution of the San Jan Basin reserve issues raised by the plans of divestiture.

6. The California PUC is familiar with the contracts known as the "Sumas Exchange Agreement", the "San Juan Gathering Agreement" and the "Colorado Interstate Service Agreement". Accordingly, California PUC is in a position to inform the Court on problems raised by these contracts, including the impact which unconditioned re-establishment of the contracts may have on the California market.

[fol. 467] The impact on the California market of the proposed "Kingsgate Agreement" between El Paso and New Company is another significant and important matter upon which the California PUC may advise the Court.

7. The California PUC also has a general interest in other matters relative to this divestiture proceeding. It has continuing jurisdiction and supervision over natural gas distributing utilities within the State of California who purchase from El Paso. Its participation as *amicus curiae* is desirable to complete the record in this proceeding, enabling this Court to avoid any action which may inadvertently have an adverse effect upon El Paso's ability to serve its largest market.

Wherefore, the Public Utilities Commission of the State of California respectfully prays that the Court enter an order herein permitting it leave to intervene as *amicus curiae*.

Dated: December 11, 1964

Richard E. Tuttle, Attorney and Chief Counsel for the Public Utilities Commission of the State of California.

[fol. 468] Certificate of Service (omitted in printing).

[fol. 470]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

MOTION THAT THIS COURT, EX PARTE, ISSUE ITS WRITTEN ORDER TO BE ENTERED IN THE CLERK'S DOCKET IN FINAL DETERMINATION OF THE PETITION TO INTERVENE OF STATE OF CALIFORNIA AND ON THE REQUEST OF THE STATE OF CALIFORNIA FOR A RULING ON SAID PETITION AND FOR A STAY PENDING THE RULING THEREON—Filed December 23, 1964

Comes Now the State of California to move that this court, ex parte, issue its written order to be entered into the Clerk's Docket pursuant to Rule 79(a) of the Federal Rules of Civil Procedure in final determination of the petition of the State of California to intervene in this proceeding and of the request of the State of California for a ruling on said petition and for a stay pending the ruling thereon.

William M. Bennett, Special Counsel for The People of the State of California, Room 5068 State Building, San Francisco, California.

[File endorsement omitted]

[fol. 471]

STATEMENT OF WILLIAM M. BENNETT, SPECIAL COUNSEL FOR THE PEOPLE OF THE STATE OF CALIFORNIA, IN SUPPORT OF MOTION THAT THIS COURT, EX PARTE, ISSUE ITS WRITTEN ORDER TO BE ENTERED IN THE CLERK'S DOCKET IN FINAL DETERMINATION OF THE PETITION TO INTERVENE OF THE STATE OF CALIFORNIA AND ON THE REQUEST OF THE STATE OF CALIFORNIA FOR A RULING ON SAID PETITION AND FOR A STAY PENDING THE RULING THEREON

The State of California has duly filed its petition to intervene in this matter, its statement in support of application for leave to intervene, and its request for ruling on said application or a stay of proceedings herein pending such ruling; and this court pursuant to said request for a ruling, on December 8, 1964, in open court, did orally deny said petition to intervene.

No written denial or minute order of the clerk of said oral denial of the petition and request for ruling of the State of California has been entered in the Clerk's Docket pursuant to Rule 79(a) of the Federal Rules of Civil Procedure.

This motion is based upon the pleadings, documents and briefs on file herein, and the oral arguments presented [fol. 472] to this court, both in support and in opposition to intervention in general and to the intervention of the State of California in particular.

To expedite the business of this court, this court is requested to make a written determination of this motion without oral hearing, ex parte, upon said written and oral statements in support and opposition pursuant to Rule 78 of the Federal Rules of Civil Procedure.

William M. Bennett, Special Counsel for The People of the State of California, Room 5068 State Building, San Francisco, California.

[fol. 473] Proof of Service (omitted in printing).

[fol. 475]

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

SALT LAKE CITY, UTAH

December 31, 1964

To:

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Re: C 143-57

UNITED STATES OF AMERICA,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

Please Take Notice, that the above entitled action has been set for:

Hearing

on Tuesday, January 5, 1965 at 10:00 a.m. before Honorable Willis W. Ritter in Salt Lake City, Utah.

Andrew John Brennan, Clerk, By: hs, Deputy Clerk.

hs

[fol. 476]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil Action No. C 143-57

[Title omitted]

PLAINTIFF'S BRIEF OPPOSING DEFENDANT EL PASO'S PLAN OF DIVESTITURE AND PRESENTING PLAINTIFF'S ALTERNATIVE PLAN—Filed January 6, 1965

LARRY L. WILLIAMS
JACK L. LIPSON
LAWRENCE F. NOBLE
Attorneys, Department of Justice.

[File endorsement omitted]

[fol. 477]

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[fol. 478]

Proceedings In This Case

On April 6, 1964, the Supreme Court handed down an opinion holding that El Paso Natural Gas Company's acquisition of the outstanding capital stock of, and subsequent merger with Pacific Northwest Pipeline Corporation violated Section 7 of the Clayton Act. The Supreme Court ordered divestiture "without delay." *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964). Judgment of the Supreme Court was filed in this Court May 5, 1964.

On October 19, 1964, defendant El Paso submitted to this Court a proposed Plan of Divestiture which had been shown to the Government and the moving intervenors in this case only a few days before. While the general nature of the plan contemplated by El Paso had been discussed with the Government prior to the submission of this Plan of Divestiture to the Court, there was no discussion of any

plan of comparable detail and the Government reserved the right to oppose El Paso's plan. On October 19, 1964, this Court allowed the Government until December 2, 1964 to evaluate the detailed El Paso Plan of Divestiture.

Summary of Argument

In this brief the Government will discuss the El Paso Divestiture Plan filed with this Court and will point up those serious flaws which make it unacceptable. Further, the Government herein proposes an alternative procedure which will permit the Court and the Plaintiff to become aware of the opportunities which exist for an outright sale of the divested facilities which will assure the restoration of the competition lost through the merger.

There are two principal complications connected with achieving appropriate divestiture in this case. First: The merger of assets between the two companies has been in [fol. 479] effect since December 1959, hence a divestiture decree must incorporate an appropriate allocation of assets which have been acquired both before and since the merger. Second: The interstate transmission of natural gas is subject to regulation by the Federal Power Commission under the terms of the Natural Gas Act and we believe that this Court ought to accommodate the purposes of that Act to the maximum degree possible while retaining its own jurisdiction in enforcing the antitrust laws. See *California v. FPC*, 369 U.S. 482 (1962). While we believe that responsibility for the approval of any divestiture must remain with this Court we see no reason why the Court should not solicit from the Federal Power Commission such advice as the Court may feel it needs with respect to matters within the expertise of the Commission.

We believe that the El Paso Plan of Divestiture fails to provide for appropriate relief. Instead it tends to perpetuate the very anti-competitive effects this litigation was intended to prevent. Appended to this document is a suggested alternative form of decree. The Government's proposed decree describes in general terms the assets which

must be divested and provides an opportunity for third parties to present to the Court specific proposals for the purchase and operation of the divested facilities.

Deficiencies in The El Paso Plan

The El Paso Plan of Divestiture is deficient in the following respects:

First: El Paso's "spin-off" plan fails to establish New Company as a corporation that will be completely independent of El Paso. Under the El Paso Plan of Divestiture a community of interest may be maintained between the two companies through their ownership by substantially the same stockholders. Even if El Paso refrains from overt interference in the affairs of New Company it is unreasonable to expect New Company's management—however well intentioned—to actively complete with El Paso for new markets and new gas supplies while subject to common ownership.

[fol. 480] Second: The failure to allocate to New Company a fair share of the important San Juan Basin gas reserves that have been acquired by El Paso since the stock acquisition and since the merger, will deprive New Company of its fair share of gas which it would need to compete for additional markets.

It should be recalled that the Supreme Court found that

> Pacific Northwest was no feeble, failing company; nor was it inexperienced and lacking in resourcefulness. It was one of the two major interstate pipelines serving the trans-Rocky Mountain States; it had raised $250 million for its pipeline that extended 2,500 miles through rugged terrain. It had *adequate reserves* and managerial skill. It was so strong and militant that it was viewed with concern and coveted, by El Paso. 376 U.S. 651 at 661-62. (Emphasis supplied.)

Failure to provide for an appropriate allocation of these combined gas reserves would make it a more feeble com-

petitor than Pacific Northwest would have been had it remained independent of El Paso.

Third: Under the El Paso plan certain contracts to which Pacific Northwest had been a party, prior to the merger, will be transferred to New Company with this important difference: El Paso has unilaterally changed some of the most important provisions in these contracts to the detriment of New Company. We think then any such changes should not be forced on New Company through El Paso's unilateral action but should be arrived at through arms length bargaining subject to the normal review procedures of the Federal Power Commission.

Fourth: El Paso proposes to hold back from New Company one of the most valuable assets it acquired from Pacific Northwest, i.e., 1,157,125 shares of common stock in Westcoast Transmission Company, Ltd. valued at approximately $17 million. It is our position that implicit in any divestiture order is a requirement that El Paso must return what it acquired.

Fifth: El Paso, in its plan, has made no effort to allocate to New Company another principal asset acquired from Pacific Northwest at the time of the merger consisting of over $53 million in tax loss carry-overs. Clearly some fair allocations must be made of this asset and we shall speak of this in more detail in a later portion of this brief.

[fol. 481] I El Paso's Spin-Off

El Paso's proposal to spin-off shares in New Company to its own share-holders does not provide adequate relief in this case because both companies will thereafter be owned and controlled by the identical group of shareholders.[1]

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[1] Under El Paso's proposed "Interlocutory Decree For Divestiture" submitted to the Government on November 19, 1964, the relevant Section -IV (G) provides:

"(G) Within three years after the transfer of the assets to New Company as herein provided, El Paso shall, consistent with

In Plaintiff's view, the El Paso proposal is so deficient from an antitrust standpoint as not to provide a reasonable basis for further discussion. The controlling cases establish that the kind of spin-off proposed by El Paso fails to meet established requirements of law. The propriety of a spin-off as an appropriate form of relief in undoing an unlawful merger was the subject of decision in *United States* v. *Union Pacific* (Relief Opinion), 226 U.S. 470 (1913). In its decision on the merits of that litigation the Supreme Court had held that Union Pacific's acquisition of 46 percent of Southern Pacific's stock violated the Sherman Act. The District Court was then ordered to provide for the disposition of these Southern Pacific shares in a way that would eventually dissolve the unlawful merger. The Supreme Court's Relief Opinion (*supra*) arose out of a post-decision motion filed by the United States and joined in by the defendant railroads (appellees) asking the Court to instruct the District Court on the propriety of a spin-off as an appropriate remedy, specifically

> whether or not a sale of the Southern Pacific Company shares held by said appellees to the shareholders of appellee Union Pacific Railroad Company, substantially in proportion to their respective holdings, or a distribution thereof by dividend to the Union Pacific stockholders entitled to such dividend, would in the opinion of this court, constitute a disposition of said shares in compliance with the opinion herein filed [opinion on the merits]. (471)

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the provisions of Sections V and VI of this Decree, divest itself of all of its legal and equitable right, title and interest in and to said shares of stock in New Company by one or a combination of the following methods:

(1) sale of said shares of stock to the common stockholders of El Paso through issuance of rights to purchase said stock; or

(2) direct single or multiple distribution of said shares to El Paso's common stockholders.

[fol. 482] The appellees contended that such a spin-off among Union Pacific's 22,000 stockholders would effectually conclude the combination. They relied on *Northern Securities Company* v. *United States*, 193 U.S. 197 and the decree of the Circuit Court in *Standard Oil Company* v. *United States*, 222 U.S. 1 in which similar spin-offs had been sanctioned.

The Supreme Court first decided that it was impossible to undo the transaction by which Union Pacific originally acquired these shares largely because (as in the case of El Paso's acquisition of Pacific Northwest shares) they were originally acquired by purchase from private parties. Nevertheless the Supreme Court refused to follow the *Northern Securities* and *Standard Oil* cases as precedents. According to the Supreme Court's rationale the ultimate source of any corporation's power rests with its shareholders and since the shareholders that controlled Union Pacific would, under the proposed spin-off, be identical with the shareholders of Southern Pacific it characterized the spin-off as "a proposition to perpetuate the domination and control of the Union Pacific Company over the Southern Pacific Company . . . " (475).

Nor was the Supreme Court willing to concede the appellees' contention that because there were so many shareholders there was no probability that they would act together and to continue control of Union Pacific over Southern Pacific. The Court took a realistic view of the inertial force that tends to perpetuate power once acquired:

> It is by no means improbable, but quite likely, that, if the stock was transferred to the stockholders of the Union Pacific Company by distribution among them, the large stockholders could, by purchases and transfers of the stock, get into their own hands the power of choosing directors of both companies, and thus, though in a different manner, the Southern Pacific Company would continue to be in the practical control of the Union Pacific Company, which has been found to be a rival and competing company within the meaning of the law. (476)

[fol. 483] The Court also observed that many of the smaller Union Pacific shareholders might not wish to purchase the Southern Pacific shares and these unclaimed rights "might be readily acquired from them by the larger and more active interests vested in the hands of the larger stockholders and thus again the conditions forbidden be created and perpetuated." (*Ibid*)

El Paso's proposal to sell warrants to its shareholders thereby giving them the right to purchase New Company shares, is a close parallel of Union Pacific's plan and should be rejected for the same reasons. Due to the dispersion of shareholdings, El Paso's Board of Directors is self perpetuating. Since the spin-off envisages an identity of shareholders in each corporation, the large active interests that now control El Paso could also reasonably be expected to control and set policy for New Company.

This same opposition to spin-offs as a method of relief in antitrust cases has since been maintained by the Supreme Court. Following the decision on the merits in *United States* v. *Reading Company*, 253 U.S. 26, where it was there held that a combination of railroads and coal companies violated the Sherman Act, the Supreme Court's mandate ordered the District Court to dissolve the combination. The provisions of the resulting District Court decree required (1) the incorporation of a new Coal Company, out of the assets of the merged Reading Company and existing Coal Company; (2) distribution of shares of new Coal Company to a trustee appointed by the District Court; (3) transfer by this trustee of certificates of interest in the new Coal Company to the Reading Company, (4) which then was required to distribute these certificates of interest to the shareholders of Reading; and (5) most importantly, these certificates were to be exchanged by the Reading shareholders for stock in new Coal Company *only*

> . . . when accompanied by an affidavit, stating among other things that the holder is not an owner of any stock of the Reading Company and is not acting for or on behalf of any stockholder of the Reading Company,

> or in concert, agreement or understanding with any other person, firm or corporation for the control of the Coal Company in the interest of the Reading Company, but in his own behalf in good faith. (*Continental Insurance Co., et al.* v. *U.S.*, 259 U.S. 156, 162)

[fol. 484] Thus, while the form of divestiture used was a spin-off, the decree effectively required the recipients of these certificates of interest to sell their holdings in either the railroad shares or Coal Company shares. It thereby insured that there would be completely separate stockholders for each of the two companies. This points up the principal drawback of the El Paso plan. That plan does not require any subsequent sale of the distributed New Company shares but allows them to remain in the hands of El Paso's shareholders.

These provisions in the Reading Decree came up for detailed review by the Supreme Court in *Continental* v. *United States,* 259 U.S. 156 (1922), where Chief Justice Taft analyzed the effect of the above section of the decree. He viewed it as requiring the holders of Reading Company shares to either sell their certificates of interest in new Coal Company to persons not stockholders in Reading, or to sell their stock in Reading before they themselves became stockholders in new Coal Company; or doing neither by a certain cut-off date, to let the Court sell their stock for their account. Speaking for a unanimous Court the Chief Justice specifically approved the District Court's plan as one which would successfully end the illegal relationship between the Reading Company and the existing Coal Company. Even so, the Supreme Court felt it necessary to tighten the effect of the decree in a way that would further insure the complete separation of the stockholders of Reading from those of Coal Company, and on its own initiative the Supreme Court inserted the following clause into the decree:

> . . . not only shall the stockholders of the Coal Company upon receiving and registering their stock be required to make affidavit that they have no stock ownership in

the Reading Company and are not acting for, or representing, anyone who has, but also that the merged Reading Company shall be required to adopt a by-law effective till the further order of the court permitting registration of transfers of shares of its capital stock in the names only of persons who shall make affidavit that they are not stockholders, registered or actual in either the new or the old Coal Company, and have not been and are not holders of proxies to vote shares of stock therein. (175)

[fol. 485] El Paso's proposed spin-off would not even begin to meet the standards of either the *Union Pacific* or the *Continental* cases. The ownership of New Company stock under El Paso's plan will be substantially identical with the ownership of El Paso itself. Some shares, which would be beneficially owned by the El Paso management and persons closely related to them, totaling perhaps 3 percent of all outstanding, would be trusteed; but even this would be done on a temporary basis pending the resignation or retirement of El Paso's officers and directors. Under this proposal it is most unlikely that New Company would ever in the future be controlled by any independent group of shareholders not associated with El Paso. It therefore seems virtually certain that the two companies will, under this plan, never again become effective competitors.

Since the purpose of a decree in a civil antitrust suit is to "effectively pry open to competition a market that has been closed by defendants' illegal restraints . . . if this decree accomplishes less than that, the Government has won a lawsuit and lost a cause." *United States* v. *E. I. duPont* (Relief), 366 U.S. 316 (1961).

In the *duPont* case which is the most recent Supreme Court statement on the subject, a spin-off of voting rights alone was considered an unsatisfactory form of divestiture because about 15.9 percent of General Motors' shares would have been voted by duPont shareholders. "Common sense tells us that under this arrangement there can be little assurance of the dissolution of the intercorporate com-

munity of interest which we found to violate the law. The duPont shareholders will *ipso facto* also be General Motors voters. It will be in their interest to vote in such a way as to induce General Motors to favor duPont. . . . We are not required to assume, contrary to all human experience, that duPont's shareholders will not vote in their own self interest" (331-2).

[fol. 486] How much less effective then is El Paso's proposal where 100 percent of the voting power *and* the stock ownership of New Company are both passed through to El Paso's shareholders.

While there may be some concern about the tax burdens on El Paso that might follow if the Court requires an outright sale of the assets which are to be divested, private interest has always been held secondary to the effectuation of the basic public policy contained in the antitrust laws. See *United States* v. *E. I. duPont,* at 332; *Continental* v. *United States, supra.*

In view of the Supreme Court mandate that there be a divestiture without delay, Plaintiff respectfully urges that the Court schedule hearings at which proposals might be heard from third persons interested in purchasing and operating the divested facilities at the earliest possible date which would permit such proposals to be properly prepared. The principal objective of such hearings would be to assure that such proposals are basically sound and consistent with the antitrust objective of restoring the competition lost through the merger. Indeed without such proposals the Court will have no assurance that the New Company El Paso proposes to create has a substantial value for anyone but the owners of El Paso. Unless it has such value no operation of the New Company as a competitor of El Paso may reasonably be anticipated.

[fol. 487] II The Assets to be Divested

The El Paso proposal is deficient not only in its failure to provide for an effective method of divestiture, but also in that it fails to make any provision for the return of an

allocable portion of the reserves acquired in the San Juan Basin during the period when competition from Pacific Northwest was suppressed; it fails to provide for the return of stock of Westcoast Transmission Company, Ltd. which was a Pacific Northwest asset; it fails to compensate for the substantial benefit which El Paso has obtained and of which Pacific Northwest has been deprived, arising out of certain tax losses of Pacific Northwest existing at the time of the merger; and it seeks to unilaterally modify contracts which existed between the two companies at the time of the merger. Plaintiff's proposed order provides for a correction of these deficiencies, which are discussed in the immediately succeeding portions of this brief.

A. Allocation of Gas Reserves

The gas reserves which El Paso proposes to divest to New Company in the San Juan Basin are, with very limited exception, the gas reserves which were owned or controlled by Pacific Northwest at the date of merger, less subsequent production. The volume of these reserves as reported by El Paso, at the time of the merger, December 31, 1959, including the reserves owned by Pacific Northwest's subsidiary, Northwest Production Company, were as follows:

	M³ cf—14.74 p.s.i.a.
Leaseholds & Gas Rights	3,653,800
Gas Purchase Contracts	1,102,900
Total	4,756,700

[fol. 488] The volume of gas reserves proposed to be transferred to New Company at January 1, 1964 is as follows:

	M³ cf—14.73 p.s.i.a.
Leaseholds & Gas Rights	1,751,300
Gas Purchase Contracts	766,800
Total	2,518,100

This volume would be further reduced by the estimated production of 44.6 trillion cubic feet in the year 1964. This is less than the amount of gas Pacific Northwest had in the San Juan Basin at the time of merger.

The above figures indicate a shrinkage of 2.2286 trillion cubic feet during the intervening four year period although production amounted to only 203.5 billion cubic feet. It appears that for the year 1959 and prior years the *pore volume* method of reserve determination was used to estimate the reserves of both El Paso and Pacific Northwest. Because of FPC staff criticism of this method, El Paso changed its reserve estimation method to the *pressure decline* method in 1960. This change brought about a substantial reduction of the estimated gas reserve volumes in the San Juan Basin applicable both to gas acreage and gas purchase contracts acquired from Pacific Northwest as well as the acreage and gas purchase contracts which El Paso held at the time of the merger. These reductions resulted in the reserve volume of Pacific Northwest being reduced by 2.0866 trillion cubic feet. Applying this reduction to the estimated volume at December 31, 1959 results in a reserve volume at that date of 2.6701 trillion cubic feet.

El Paso's reserves in the San Juan Basin at December 31, 1959 were reported as follows:

	M² cf—14.73 p.s.i.a.
Leaseholds & Gas Rights	7,761,900
Gas Purchase Contracts	4,760,000
	12,521,900

[fol. 489] After divestiture El Paso would have gas reserves in the San Juan Basin as follows at January 1, 1964:

	M² cf—14.73 p.s.i.a.
Leaseholds & Gas Rights	5,915,600
Gas Purchase Contracts	6,369,400
Total	12,285,000

These volumes would be reduced by the 1964 production estimated at 300.322 billion cubic feet.

Contrary to the situation as to New Company, El Paso would own or control a volume of gas reserves in the San Juan Basin after divestiture which is in excess of the volume it had at the time of the merger, despite the reduction of 4.7524 trillion cubic feet due to changing the method of reserve estimation. When this reduction is applied to the December 31, 1959 reserve estimate the adjusted reserve volume at that date is 7.7695 trillion cubic feet.

Based on the aforegoing adjusted reserve estimates at December 31, 1959, Pacific Northwest owned or controlled 25.59% of the total gas reserves owned or controlled by both Pacific Northwest and El Paso at that date based on the *pressure decline* method of gas reserve determination. However, under the Plan of Divestiture New Company would own or control at January 1, 1964 only 17.06% of the combined San Juan Basin reserves of New Company and El Paso at the date.

The difference is due to the fact that with very limited exception all acquisitions of additional leaseholds and gas rights and all new gas purchase contracts acquired since December 31, 1959, have been retained by El Paso. Additions to gas reserves of New Company by reason of acquired leaseholds and gas rights and gas purchase contracts amounted to 148.1 billion cubic feet while such additions attributed to El Paso have amounted to 3.2993 trillion cubic feet. These reserve acquisitions cover the four year period from January 1, 1960 to December 31, 1963. However, during the three year period January 1, 1957 to December 31, 1959, while El Paso owned Pacific Northwest's [fol. 490] stock, El Paso acquired a substantial amount of leaseholds and gas rights in the San Juan Basin while Pacific Northwest acquired none. El Paso also entered into a large number of contracts for the purchase of gas in the San Juan Basin in this period while Pacific Northwest entered into very few contracts and these contracts were in the area denominated by El Paso as the Pacific

Area of San Juan and Rio Arriba Counties, New Mexico and LaPlata County, Colorado.

El Paso's proposed divestiture of reserves in the San Juan Basin to New Company raises two serious problems. First, the proposal is manifestly unfair in that it deprives New Company of any significant share of the gas reserves developed in the San Juan Basin during the period when El Paso controlled Pacific Northwest and also subsequent to the merger. Second, this proposed course of action would serve to impede and postpone the possible competitive thrust of New Company into the California market.

It is apparent that El Paso has interpreted the Supreme Court's mandate to mean that it was only required to return to New Company the San Juan Basin reserves that it originally got from Pacific Northwest.

Prior to El Paso obtaining control of Pacific Northwest, the two companies were in fierce competition in the acquisition of gas acreage and gas purchase contracts in the San Juan Basin. It is unthinkable that this competitive effort would have ceased in the absence of the stock acquisition by El Paso. It is certain that Pacific Northwest with its plan to invade the California market would have been most aggressive in obtaining gas reserves in the San Juan Basin and elsewhere along its pipeline. The favorable cost of the San Juan Basin gas reserves as compared with Canadian reserves which are located much farther from the California market was and continues to be of vast importance. It cannot be fairly assumed that the alert Pacific Northwest management would have sat on its hands and let El Paso gobble up all of the remaining uncommitted San Juan Basin reserves.

[fol. 491] In order that New Company will be in a position to compete for a share of the California market it must have at its command gas reserves in excess of what is proposed to be turned over to it by El Paso through the divestiture proceeding. While a fourteen year deliverability life, which New Company will have according to the El Paso plan may adequately meet FPC standards for the markets

of New Company in Colorado, Wyoming and the Pacific Northwest, it is insufficient to take care of any major expansion project to serve the California market. The minimum initial expansion would run from 150 million to 200 million cubic feet per day compared with New Company's 1965 projected average daily delivery of 870 million cubic feet. On the basis of an assumed 85% load factor operation for the California line, the delivery of 150 million cubic feet per day would require a minimum reserve of approximately 950 billion cubic feet and reasonably in the neighborhood of 1.25 trillion cubic feet in order to provide for a daily delivery life of approximately 14 years. The logical and most economical source of such gas reserves is in the San Juan Basin.

We believe that New Company should obtain from El Paso such volume of gas reserves in the San Juan Basin as will place it in the same position, reserve-wise, to El Paso that it had at the time El Paso secured control. While even a minimum reserve addition of 600 billion would not, in itself, be adequate for a major project to serve California, it would greatly facilitate the early feasibility of such a project.

The Supreme Court referred in its opinion to the location of the gas reserves of Pacific Northwest in relation to the potential California market and stated that had Pacific Northwest remained independent it no doubt would have sought to exploit its formidable geographical position vis-a-vis California.

[fol. 492] It would seem indisputable that a divestiture in accordance with the intent and purpose of the Supreme Court, in holding that El Paso had unlawfully acquired the stock of Pacific Northwest because such acquisition had the effect of lessening competition, must result in restoration of New Company to substantially the same position it had prior to acquisition, i.e., of having enormous gas reserves in the San Juan Basin strategically located with respect to the California market. El Paso should not be permitted, in purported compliance with the decision of the Supreme Court, to place the New Company at a disadvantage insofar

as being a potential competitor in the California market through denying New Company its fair share of the additional gas reserves which have been developed during the intervening eight years when El Paso had complete control of the acquisition by Pacific Northwest of gas reserves in the San Juan Basin.

The consequences of the antitrust violation, which the Supreme Court decision was designed to rectify, would instead be perpetuated unless New Company is able to enjoy the fruits of the development of San Juan Basin gas reserves in which Pacific Northwest would have participated had it not been for the unlawful acquisition by El Paso of its stock.

The Government's proposed decree (Appendix A) would carry this Court's order that there be allocated to New Company a fair proportion of San Juan Basin gas reserves acquired by El Paso since January 1, 1957.

B. Contracts

1. San Juan Gathering Contract

El Paso seeks court approval of a contractual arrangement between El Paso and New Company pertaining to gathering each other's gas in certain areas of the San Juan Basin. This proposed agreement is substantially identical to the contract between El Paso and Pacific Northwest which was negotiated prior to the stock acquisition except for an increase in the charge from 1.375¢ per Mcf to 4.5¢ per Mcf for the gas gathered.

[fol. 493] The prior agreement, dated August 2, 1956, had been filed by El Paso and Pacific Northwest as an FPC rate schedule (Pacific Northwest Rate Schedule X-2).

The justification offered by El Paso for the change in the gathering charge as stated in the proposal submitted to the Court is that the price has been arrived at on the basis of extensive experience by El Paso in the San Juan Basin; and that it compares with a charge agreed to by El Paso for payment to Southern Union Gas Company for gas gathered by that company.

We have set forth below the estimated volumes of New Company gas to be gathered by El Paso, the volume of El Paso gas to be gathered by New Company, the Balancing Gas amount to which the gathering charge would apply, the annual payments to be made at 1.375¢ and 4.5¢ per Mcf respectively, and the computed increase in the annual charge.

Year	By El Paso for New Company	By New Company for El Paso	Balancing Gas Amount	Cost at 1.375¢ per Mcf.	Cost at 4.5¢ per Mcf.	New Company Increase in Gathering Cost
	Mcf.	Mcf.	Mcf.			
1965	18,679,605	7,507,685	11,171,920	$153,614	$502,736	$349,122
1966	21,566,755	8,138,040	13,428,715	184,645	604,292	419,647
1967	25,541,970	8,619,840	16,922,130	232,679	761,495	528,816
1968	28,150,990	8,744,305	19,406,685	266,842	873,301	606,459
1969	28,332,760	8,630,425	19,692,335	270,770	886,155	615,385
1970	29,439,805	8,811,830	20,627,975	283,637	928,258	644,621

It is clear from the above tabulation that the proposed increase of 32% in the gathering charge would have a substantial financial impact on New Company's cost of service.

El Paso does not suggest that it has had increased gathering experiences in the San Juan Basin. Indeed there is reason to believe that because there have been increased volumes of gas gathered, the costs may have actually decreased.

[fol. 494] We are of the firm opinion that the gathering charge should not be increased through the medium of this divestiture proceeding. The prior charge of 1.375¢ is that specified in the filed FPC rate schedules of El Paso and Pacific Northwest which were in effect at the time of the merger. This arrangement was negotiated between the two parties at arms length and, the contract contemplated modification only through an appropriate filing with the Federal Power Commission. It is our understanding that El Paso has been using the 1.375¢ per Mcf as a basis of recording the gathering charges as between its Northwest and Southern divisions since the date of the merger.

In our opinion, these prior rate schedules should be refiled with the Federal Power Commission. After that filing is made El Paso can file a change in rates to effect such revision of the gathering charge as it believes is warranted. No justification exists for attempting to use this Court action to secure a rate increase through a unilateral revision of the contract. El Paso cannot bargain with itself. The Federal Power Commission is the appropriate agency to pass upon the justness and reasonableness of the gathering charges in a proceeding under Section 4 of the Natural Gas Act where the respective claims, and justifications, can be fully tested.

2. Kingsgate Gas Agreement

El Paso also seeks this Court's approval of a contract whereunder El Paso would purchase certain volumes of gas from New Company over a five year period which New Company would buy from Westcoast Transmission Company at the Canadian border near Kingsgate, British Columbia. This proposed contract is vastly different from the prior contract between El Paso and Pacific Northwest pertaining to the same Kingsgate gas. We believe that the former contract, which was designated as Pacific Northwest FPC Rate Schedule X-5, should be reinstated without change.

[fol. 495] Pacific Northwest entered into the 150 million cubic feet per day purchase agreement with Westcoast in May 1957 at the behest of El Paso who desired this Canadian gas supply for its Southern division customers.

Under Rate Schedule X-5, the gas which Pacific Northwest would purchase at Kingsgate from Westcoast would be transported by Pacific Gas Transmission Company (Pacific Gas) in its pipeline to a point near Spokane, Washington, where delivery would be made into the facilities of Pacific Northwest. Pacific Northwest would in turn make redelivery of the gas to El Paso in the San Juan Basin at the outlet of Pacific Northwest Compressor Station No. 1 near Ignacio, Colorado, until such time as El Paso should

direct delivery to be made at the discharge side of Pacific Northwest No. 6 Compressor Station near Rock Springs, Wyoming. At the date of this agreement, September 1, 1959, El Paso and Pacific Northwest had already filed applications with the Federal Power Commission to construct and operate, in conjunction with Colorado Interstate, the Rock Springs project which involved a large diameter transmission line from Rock Springs, Wyoming, to the California border near Las Vegas, Nevada. The 150 million cubic feet per day of Kingsgate gas represented part of Pacific Northwest's gas supply contribution to the project and this explains the designation of Pacific Northwest Compressor Station No. 6 as the ultimate delivery point.

The Kingsgate gas did not become available to El Paso's Northwest division until the completion of the Pacific Gas transmission line in December 1961. The Federal Power Commission turned down the Rock Springs project July 12, 1963. Ever since December 1961, El Paso has been subject to the Kingsgate purchase obligation, although the project for which it was originally acquired never materialized.

One provision of Rate Schedule X-5 was of particular value to Pacific Northwest and it assumes even greater [fol. 496] importance in the light of El Paso's proposal to transfer to New Company the 90% load factor, take or pay, contract obligation of 150 million cubic feet per day with a cost of approximately 29.5¢ per Mcf. Article IV of the rate schedule provides:

> El Paso agrees to take and purchase from Pacific and Pacific agrees to sell and deliver to El Paso commencing January 1, 1961, natural gas in daily volumes substantially equivalent to those from time to time then being received by Pacific from P.G.T., the point of delivery from P.G.T. to be set at the point of interconnection between the facilities of P.G.T. and Pacific in the vicinity of Spokane, Washington; provided, however, and notwithstanding the foregoing, that *Pacific shall have the unrestricted right to curtail or interrupt*

such deliveries with prior notice to El Paso whenever and to the extent, in Pacific's sole judgment, such curtailment or interruption is required in order that Pacific may satisfy the demands of its other customers for natural gas service. (Emphasis supplied.)

By this provision it was recognized by El Paso that Pacific Northwest had priority to the Kingsgate gas to the extent that in its sole judgment curtailment or interruption thereof was necessary to satisfy the demands of its other customers.

Under the changed agreement now submitted by El Paso as part of its divestiture plan, New Company would be required to fulfill the entire obligation to Westcoast of the May 25, 1957 agreement, and no portion thereof would be assumed by El Paso except to the extent of 22 billion cubic feet in the year 1965 and lesser volumes in succeeding years which decrease at the rate of 4 billion cubic feet per year. Twenty-two billion cubic feet represents an average daily quantity of 60,273 Mcf per day. El Paso recognizes that New Company cannot absorb the full volume provided by the Westcoast contract and accordingly has offered the five-year step-down concession.

When the Federal Power Commission authorized the importation of the Kingsgate gas in Docket No. 17,350, et al. (Order issued August 5, 1960), it recognized the priority of service needs of the Pacific Northwest vis-a-vis El Paso's requirements for the 150 million cubic feet per day of Canadian gas. Accordingly, the Commission reserved 30 [fol. 497] million cubic feet (peak day) for applications for new service in the Pacific Northwest to be filed within three years from the date the line was placed in service and permitted such volume to be sold elsewhere on the El Paso system on a temporary basis until El Paso had demonstrated that such supply is not needed in the Pacific Northwest. It is clearly evident from this decision of the Commission that El Paso would be obligated to take the entire amount of Kingsgate gas except when it was required to meet market requirements in the Pacific Northwest.

The proposed commitment of New Company to 200 million cubic feet per day at Sumas and 150 million cubic feet per day at Kingsgate would tie the Pacific Northwest markets quite rigidly to these Canadian supplies with their stringent take-or-pay requirements. The flexibility which was inherent in Rate Schedule X-5 is destroyed by El Paso's proposed new contract. The new arrangement could have the effect of requiring widely varying takes of gas by New Company in the Big Piney field of Wyoming and in the San Juan Basin, which may not be accommodated under existing proration requirements.

As with the gathering contract rate change, El Paso's proposal as to the Kingsgate gas is another effort to bypass the Federal Power Commission jurisdiction as to contract obligations and rate changes. In this case it would also override the provision of the Commission's Order quoted above. In our view it is plainly contrary to the intent of the divestiture proceeding to permit El Paso to make a unilateral change affecting the rights and obligations of the two corporations as they existed at the time they were illegally put together.

C. Westcoast Transmission, Ltd. Stock

In 1956 Pacific Northwest acquired 25 percent of the common stock of Westcoast Transmission, Ltd., a Canadian pipeline company which supplied gas to Pacific Northwest at the U.S. Canadian border. Pacific Northwest's cost for these 1,127,750 shares equalled $5,638,750. As a result of [fol. 498] the merger these shares were acquired by El Paso from Pacific Northwest.

El Paso does not propose to transfer these shares to New Company. Instead it proposes to sell its stock interest in Westcoast and retain the proceeds for itself. These shares are presently valued at between $17-20 million.

There is no justification for El Paso selling this stock at a substantial profit to itself. This stock is an asset which belonged to Pacific Northwest and it is our firm opinion that it should be transferred along with the other acquired

assets. Certainly the mandate of the Supreme Court that the acquired assets be divested cannot be interpreted as calling for a piecemeal sale of those assets to the highest bidder. *All* of the acquired assets, including the Westcoast stock should be divested intact to a single purchaser. Although we believe that the purchaser should be required to dispose of the Westcoast stock because Pacific Northwest probably acquired it illegally, its disposition should not be determined by El Paso, but by the Court. Certainly, the proceeds of the sale should be New Company's, not El Paso's. If the stock were sold by New Company it would provide a substantial sum for working capital purposes which now must be borrowed.

D. Pacific Northwest's Tax Losses

Prior to the merger on December 31, 1959, Pacific Northwest and its subsidiaries had accumulated tax losses aggregating $53,860,976.73. The losses were accumulated by years as follows:

1954	$ 40,277.74
1955	9,019,527.42
1956	14,683,572.48
1957	16,870,181.46
1958	9,863,607.70
1959	3,383,809.93
Total	$ 53,860,976.73

[fol. 499] One of the issues which was explored on the record of the merger proceeding before the Federal Power Commission, Docket Nos. C-13018 and G-13019, was the utilization by El Paso of these tax losses of Pacific Northwest. The Commission's order of December 23, 1959 authorizing the merger included a condition concerning the tax losses of Pacific Northwest as follows:

(I) The certificates described in paragraphs (A) and (B) hereof are issued upon the further conditions that:

(a) Upon the consummation of the merger, El Paso shall establish and maintain a special reserve upon its books of account in such amount or amounts as shall equal the amount or amounts of all tax savings from deduction by the merged corporation of Pacific's past losses, less the amount which could have been utilized by Pacific if there had been no merger;

(b) Credits to such reserves shall be made concurrently with the utilization of the tax saving, and no charges shall be made to that reserve without the authorization and approval of the Commission first having been obtained;

(c) Within 60 days of the issuance of this order, El Paso shall file a plan for disposition for the benefit of consumers of the amounts credited, or to be credited to the special reserve required in subparagraph (a) of this paragraph (1). All parties to this proceeding may file comments and views or alternative proposals with respect to such plan within 30 days after filing thereof.

No reserve was ever established by El Paso although it is our understanding that the staff of the Federal Power Commission recommended that a hearing be held to determine the amount of such reserve. El Paso filed a proposal dated April 22, 1960 in which it said that when savings are actually realized from the Pacific Northwest tax losses, after audit by the Internal Revenue Service, El Paso will establish a special reserve, Account 258 Other Reserves—Special Reserve resulting from revenue deficiencies in prior years. El Paso proposed that when the Commission had ultimately authorized and approved disposition of amounts credited to the reserve it would make transfers from the reserve to an account designated by the Federal Power Commission as Account 271, Earned Surplus—Restricted, [fol. 500] a surplus account from which dividends may not be paid. El Paso further contended that the total amount

of the losses which Pacific Northwest might have utilized had it remained a separate corporation could not be determined until after the year 1961 and that because the tax returns for 1961 would be subject to audit by the Internal Revenue Service, a final determination of the savings realized could not be made for several years after 1961. Apparently this matter has been dormant at the Federal Power Commission since sometime in 1960.

Under the five year loss carry forward provision of the Internal Revenue Code, El Paso has been able to utilize all of the tax losses of Pacific Northwest at the time of the merger with the exception of the amount of $40,277.74 applicable to the year 1954. The five year period expired with respect to this item prior to the merger. In the year 1960 El Paso utilized the 1955 and 1956 losses in the aggregate amount of $23,694,645 and utilized the balance in subsequent years.

El Paso was requested to furnish the amount of the tax losses which could have been utilized by Pacific Northwest had it not been merged into El Paso and had continued as a separate company. El Paso did not do so and stated that the answer to these questions would depend upon decisions which might have been made but which in fact were never made and that various results would have followed different decisions.

The extent to which Pacific Northwest would have been able to utilize the tax losses in full would have depended, of course, upon the amount of taxable income it would have had during each of the five years subsequent to 1959. The taxable income amount could have been influenced by Pacific's management to a considerable extent by reason of options available under the Internal Revenue Code such as [fol. 501] the capitalization for tax purposes of interest and taxes during construction rather than expensing them and the use of straight-line depreciation for tax purposes rather than accelerated depreciation. Also taxable income could have been generated through sale of capital assets and sale of production payments. Pacific Northwest did not have an option as to intangible drilling costs since it

exercised the option to expense such costs in 1955. Once such option is exercised it may not be changed in the future. It could, however, have farmed out drilling operations on its leaseholds to other producers, thus reducing the amount of its intangible drilling costs.

Because the decisions of this nature were never made and detailed information as to the Northwest division income in the years 1960-1964, on which reasonable assumptions can be based, is not available, it is impossible to arrive at a definitive answer as to the amount of accumulated tax losses, if any, which Pacific Northwest could have utilized had it remained a separate corporation. However, it is certain that a large share of the accumulated tax loss at the time of the merger would never have been created had Pacific remained a separate corporation. Of the 1956, 1957, 1958 and 1959 tax deductions of $44,801,171, during which years El Paso had control of tax decisions, approximately $31,700,000 need not have been taken including liberalized depreciation of $19,195,022. Had these deductions not been utilized during this four year period, they would have been available in later years to reduce taxable income since they are in the form of depreciation and amortization tax deductions. Moreover, similar tax deductions applicable to the Northwest division were utilized by El Paso during the years 1960-1964, inclusive, to reduce El Paso's consolidated income tax, but except for the amounts of liberalized depreciation we can only approximate their magnitude.

[fol. 502] It should be noted, however, that with respect to a substantial portion of the tax loss, that is, the loss occasioned by the use of liberalized depreciation for income tax purposes of $38,688,826 during the years 1955-1964 inclusive, El Paso intends to account to New Company therefor. El Paso proposes that a reserve for accumulated deferred income taxes of $20,065,382 be set up on New Company's books and by a like amount on El Paso's books.

During the period 1956 through 1964 El Paso had complete control as to the option of taking liberalized depreciation and also the capitalization of interest and taxes during construction and certain other items. The decisions to

exercise the option with respect to these items were based upon the fact that El Paso would be able to utilize such deductions to reduce the amount of its consolidated income tax liabilities. Thus, El Paso cannot claim that as to these deductions it was bound by a previous decision of the old Pacific Northwest management.

In the light of our analysis of available information, we believe a reasonable resolution of this matter would be the creation of a special tax reserve equal to 52% of the deductions for interest and taxes which Pacific Northwest took during the years 1956-1959 inclusive, but capitalized on its books. These amounts total $12,375,123. However, since the Federal Power Commission staff has already considered this matter we believe its advice should be sought before a final decision is made.

El Paso has made no reference to the tax carry forward losses of Pacific Northwest in its Plan of Divestiture. Apparently El Paso does not propose to deal with it all. In view of the Commission's requirement that El Paso create a special reserve to apportion this tax benefit equitably between El Paso and Pacific Northwest, El Paso should give effect to this requirement in executing any plan of divestiture.

[fol. 503]

The Government's Proposal

In the preceding sections of this brief, we have demonstrated that in its most important provisions El Paso's Plan of Divestiture fails to provide appropriate relief. Instead, the Government proposes its own decree, the principal terms of which are:

1. El Paso is ordered to divest itself of the assets described in its Plan of Divestiture and, in addition, of (a) a fair share of gas reserves acquired in the San Juan Basin since January 1, 1957, the date of the stock acquisition; (b) the 1,157,125 shares of common stock in Westcoast Transmission Company, Ltd. which were acquired as part of the merger; and (c) a fair share of the value of the tax

losses of Pacific Northwest received by El Paso as a result of the merger.

2. All contracts between El Paso and Pacific Northwest existing at the date of the merger, December 30, 1959, are to be reinstated, subject to such modifications as the Federal Power Commission may make in the exercise of its jurisdiction.

3. Such assets are to be divested at a date and to a purchaser to be determined by further order of the Court.

4. The Court will schedule hearings on proposals by persons interested in purchasing the assets and operating the facilities to be divested.

[fol. 504] The Court may then reach an informed judgment as to whether a satisfactory third party purchaser is now available or whether a "spin-off" that would promptly eliminate common ownership and control of the New Company by El Paso must be employed to accomplish the requisite divestiture.

Respectfully submitted,

Larry L. Williams, Jack L. Lipson, Lawrence F. Noble, Attorneys, Department of Justice.

Dated: December 2, 1964.

[fol. 505]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

EL PASO'S MEMORANDUM ON THE CLAIMED LEGAL BASIS FOR THE GOVERNMENT'S ASSERTION THAT EL PASO'S GAS RESERVES SHOULD BE EXPROPRIATED TO CREATE NEW COMPETITION IN CALIFORNIA—Filed January 6, 1965

I.

Legal Basis for the Government's Position on the Second Question in this Case: Further Absence of Any Authority for the Claimed Right to Punish

Yesterday afternoon El Paso gave the Court authorities in support of its position that expropriation of San Juan gas reserves owned by El Paso, and purchased and developed with its own funds after the merger, would violate both the antitrust laws and constitutional guarantees against taking of property without due process. These authorities were *Schine* v. *United States*, 334 U.S. 110, and *Reynolds Metal Company* v. *F.T.C.*, 309 F2d. 223 (D.C. Cir.).

Schine, although a Sherman Act conspiracy case in which divestiture of illegal profits obtained in the conspiracy is authorized, squarely holds that even a conspirator convicted under Section 1 may be divested *only* of property acquired in the course of the violation. It is error to divest such a conspirator of property *legally* acquired for the purpose of "restoring" the trial court's conception of "fair competition".

[File endorsement omitted]

[fol. 506] The *Reynolds Metal* decision is a Section 7 case. It holds that property acquired by a defendant after an acquisition which violates the Clayton Act may not be divested.

In his reply argument, Government counsel did not mention or otherwise refer to these applicable authorities. When specifically requested by the Court to refer to *some* authority for the Government's contention that El Paso's own gas reserves in the San Juan Basin may be stripped from it to create heretofore nonexistent competition in the California market, counsel advanced as applicable several old decisions summarized in a Government memorandum addressed to a different question, *viz.*: the "Power of the Court" to modify "Instruments Relating to El Paso's Indebtedness."

The cases there cited,[1] except for *Schubert* which did not involve antitrust, declare a general principle that the Court is empowered to deal with the secured lenders of a defendant who has suppressed existing competition through a conspiracy violating the Sherman Act *if it is necessary* to readjust lenders' security to provide effective relief. On their facts we do not question the holdings of the two cases cited by the Government.

But the Government's claim that these railroad trust Sherman Act decisions provide a legal basis for its unprecedented position here is remarkable in concept and astonishing in consequence.

In our memorandum on El Paso's proposal for distribution of New Company stock, we analyzed the essential distinction between Sherman Act and Section 7 cases. We quoted the Supreme Court's admonition in one of its most important recent *Section 7* cases (*U.S.* v. *duPont & Co.*, 366 U.S. 316), that the purpose of divestiture under Sec-

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[1] *Continental Insurance Co.* v. *U.S.*, 259 U.S. 156; *U.S.* v. *Lakeshore & M.S. Railway Co.*, 203 Fed 295 (opinion in this litigation relied on is unreported); and *Philadelphia, Baltimore & Washington Railroad Co.* v. *Schubert*, 224 U.S. 603 (involving the effect of the Employer's Liability Act on pre-existing contracts, not the antitrust laws).

tion 7 is "undoing of the acquisition" (p. 329), and that in *every* antitrust case "*relief must not be punitive*" (p. 326). [fol. 507] The Government's position on El Paso's San Juan reserves violates these rules of *duPont* no less than its unparalleled and unprecedented claims respecting the stock distribution question.

The *Continental* and *Schubert* cases are quickly laid aside. Neither had anything to do with stripping a defendant or anyone else of its property. They hold simply that where a conspiracy violative of the Sherman Act has destroyed present and past competition, if necessary in the course of divestiture, the Court has power to *readjust* lenders' security to restore competition which had been destroyed. But even this power extends only, as stated by the Court in its unreported *Lakeshore* opinion, to "substituting" for a security "its judicially ascertained equivalent". Of course, the judicial power may extend further where, as in *Continental*, the lender's security is "an indispensible instrument of the unlawful conspiracy", but this points up the distinction between the penal relief appropriate to redress a conspiracy under the Sherman Act and the *duPont* principles which prohibit punishment for a violation of Section 7 in respect of future competition.

In short, the Government's Sherman Act authorities on this question hold only that the restoration of present competition ruptured by a Section 1 violation may authorize "substitution" of judicially ascertained equivalents for lenders' securities. The assertion that *this* principle would authorize expropriation of El Paso's own property acquired with its own funds after the merger constitutes a shocking disregard of both the statute being litigated here and the very language of the decisions the Government advances to the Court.[2]

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[2] We do not pause to discuss the Government's reliance on *Philadelphia, Baltimore & Washington Railway Co.* v. *Schubert*, 224 U.S. 603 (Govt. Br. 3). It is one of a line of cases outside the antitrust field dealing with the effect of valid regulation under the

[fol. 508]

II.

Consequences of the Government's Authorities Upon the Subject to which its Memorandum is Addressed

Although counsel pressed upon the Court the decisions just discussed as authorities upon the expropriation question, the Government's memorandum is in reality directed to a different question.

The memorandum deals with the Court's power to effect divestiture in this case without the assents El Paso has obtained from its bond and debenture holders. The Government says El Paso's creditors have no "veto power" (Govt. Br. 4) over this Court and that the consents obtained to the Plan El Paso has proposed should therefore be disregarded.

We do not discuss the substantial question whether the Court's power to readjust secured debt in a Sherman Act conspiracy case may or may not be the same in divestiture under Section 7, for the Government's abrupt rejection of the interests of El Paso's creditors has a pernicious consequence which makes their legal rights immaterial as against the requirements of the Supreme Court's mandate to divest "without delay."

Assuming *arguendo* that the Court in this Section 7 case has power to readjust the interests of El Paso's secured creditors in El Paso's property in process of the divestiture, it is plain that in any such event the lenders would be entitled to their day in court. *Sutphen Estates* v. *U.S.*, *supra*, is not to the contrary, for that case involved an unsecured guarantee of a lessee's obligations, while El Paso's creditors have *present* legal interests in the assets to be divested. If the court were to permit litigation of those interests in respect of a divestiture plan different from the

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interstate commerce power upon contracts in existence prior to adoption of the regulatory statute. We are concerned here with fundamental matters of *property*, not a collision between private agreements and regulatory statutes.

one to which their assents have been given, the time required for notice and hearing of such complexities would utterly defeat the Mandate.

If it *were* necessary in this case to adjudicate El Paso's lenders' interest, then, of course, it would have to be done. But such is not the case, and the Government's abrupt repudiation of the assents given by El Paso's bond and debenture holders unconvincingly denies, or seeks to avoid, what the record shows without dispute. Immediately after the Supreme Court handed down its decision in this case, and [fol. 509] for six months thereafter, the Government negotiated closely with El Paso respecting its plan of divestiture. To expedite compliance with the Mandate, El Paso began a long series of intensive conferences with its secured creditors to secure their assents to the plan being discussed with the Department of Justice. The Government *knew* this was being done, yet it continued negotiating and did not inform El Paso that on the eve of this hearing it would announce its total opposition to El Paso's plan. Nearly all of the bond and debenture holders gave their assent. The Department of Justice received reports to this effect and remained silent.

Upon this phase of the matter, the position of the Department of Justice respecting El Paso's lenders provides little justification for its lack of candor during the period in which El Paso's voluntary efforts, taken in good faith and with the knowledge of the Government, relieved the parties and the Court of the burden of trying that issue.

Conclusion

At the conclusion of the proceedings yesterday, the Court asked the Government to cite a single case, if it has one, supporting its position that El Paso's own property may be expropriated by the divestiture decree the Court will enter in this case. The memorandum to which we here respond contains no such case. If the Government's extreme demands have even a single case to support them, we

think counsel would do well to produce it or concede without further delay that nothing of the kind he proposes here has ever before been sanctioned by any court.

Respectfully submitted,

Gregory A. Harrison, Atherton Phleger, Robert S. Daggett, Brobeck, Phleger & Harrison; Van Cott, Bagley, Cornwall & McCarthy, By Robert S. Daggett.

[fol. 510]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil Action No. 143-57

[Title omitted]

MEMORANDUM ON DIVESTITURE OF A PORTION OF THE SAN JUAN GAS RESERVES ACQUIRED SINCE THE MERGER—Filed January 6, 1965

This memorandum is submitted in support of Plaintiff's contention that in order to reestablish the competitive situation as it existed at the time of the merger, it is necessary and proper that some portion of the gas reserves acquired by El Paso since that date in the San Juan Basin be allocated to the New Company.

In order that the issue be viewed in its proper perspective, it is essential that it be recalled that the original Pacific Northwest, as contemplated by its founders and as certificated by the Federal Power Commission, relied on the San Juan Basin as its primary source of gas reserves. Prior to the certification of Pacific Northwest, El Paso was the only major purchaser of San Juan reserves, a situation which was restored when El Paso acquired the stock of Pacific Northwest and subsequently merged with it. During

[File endorsement omitted]

the short period of its existence Pacific Northwest made substantial acquisitions of gas in the San Juan Basin and was constantly seeking additional reserves which had not as yet been dedicated to El Paso. Since the merger, however, in spite of the expansion of its markets and despite new discoveries in the San Juan Basin, no attempt has been [fol. 511] made on behalf of Pacific Northwest even to replace the San Juan reserves which were used up in the service of its markets. By contrast, during the period when its illegal acquisition had removed its only substantial competitor in the San Juan Basin, El Paso has acquired over 3 trillion cubic feet of San Juan reserves.

It is undisputed that at the time of the merger Pacific Northwest had at least 21.2% of the total reserves held by it and El Paso. In view of the fact that all of Pacific Northwest's acquisitions were made within a relatively short period, whereas El Paso had been acquiring reserves in San Juan for many years prior to the formation of Pacific Northwest, it is reasonable to anticipate that Pacific Northwest's percentage of the total would have increased as its markets developed. Instead, the El Paso proposal would give to the New Company only 17.01% of the San Juan reserves, and El Paso would retain 82.99%. Under the El Paso proposal, the New Company would be almost totally dependent on Canadian reserves for its source of supply and El Paso would succeed, in spite of the Supreme Court mandate, in retaining all of the reserves which it was able to acquire at a time when it had eliminated its only major competitor.

It is the Plaintiff's position that in order to give the New Company the same position with regard to San Juan reserves as Pacific Northwest held prior to its merger, it is essential that at least 600 billion additional cubic feet of reserves be allocated to the New Company from the San Juan Basin. We regard that amount as a minimum because it would serve only to allocate to the New Company the same portion of newly acquired reserves as it had of the total San Juan reserves at the time of the merger, without

regard to the fact that much of El Paso's reserves were acquired prior to the formation of Pacific Northwest and that during the period of its existence Pacific Northwest actually acquired a much greater portion of the then [fol. 512] available reserves than is indicated by the 21.2% figure. The allocation of even this minimum amount would therefore only serve to place the New Company in the same position vis-a-vis El Paso as Pacific Northwest was without any regard for what the position of Pacific Northwest *would have been* were it not for the merger.

The position of the defendants appears to be that even an allocation of this minimum amount would in some way amount to an expropriation of El Paso's property and is not justified by the existing law. With regard to the issue of expropriation, it must be borne in mind that the Government is not suggesting that anything acquired by El Paso prior to the merger be allocated. Reserves acquired subsequent to the merger were acquired for the benefit of its entire system, not merely for its Southern Division. To limit the divestiture only to the *reserves* held by Pacific Northwest at the time of the merger makes no more sense than would a divestiture of only those contracts relating to *markets* served by Pacific Northwest at the time of the merger. Of even less logic would be the creation of a company having today's Northwest market requirements and only yesterday's reserves. In fairness to El Paso, even it does not suggest that this be done, since it is proposed that certain Canadian and Rocky Mountain reserves acquired by El Paso subsequent to the merger be allocated to the New Company. Yet it is difficult to see how expropriation, if it were such, would be legally justifiable with regard to Canadian and Rocky Mountain properties, but not with regard to San Juan property. The fact, of course, is that there is no real issue of expropriation involved. El Paso has dominated the affairs of Pacific Northwest for eight years and Pacific Northwest has been without any independent identity for six years. During the latter period no contracts have been made in the name of Pacific Northwest

because it lacked the capacity to make them. The burden of this Court is therefore to determine which of those [fol. 513] contracts and acquisitions made by El Paso are properly allocable to that portion of El Paso which was the Northwest Division and which will be the New Company. With regard to pipelines and laterals, this problem is easily resolved because of the obvious relationship of these facilities to one or the other of the two systems. The problem is more complex with regard to reserves because even El Paso did not view its acquisitions as being made for one or the other of the two systems, but for the use of the entire company. The difficulty of making such an allocation, however, does not make it any less necessary or appropriate that one be made. And plainly, an "allocation" which would give to the New Company only those San Juan reserves which it held at the time of the merger, while giving to El Paso over three trillion cubic feet in excess of its holdings at that time, is in reality no allocation at all.

In support of its position that an allocation of property purchased after the merger with funds of the merged corporation "would violate both the antitrust laws and constitutional guarantees against taking of property without due process," the defendant cites *Schine* v. *United States*, 334 U. S. 110, and *Reynolds Metal Company* v. *F.T.C.*, 309 F. 2d 223 (D. C. Cir.). Neither case supports the proposition advanced.

The *Schine* case involved a monopolization of motion picture exhibition by reason of the ownership by one organization of 148 motion-picture theatres located in 76 towns in 6 states. The District Court ordered a dissolution of the organization through its separation into several independent companies, none of which would own more than a specified number of theatres in any city. In so doing, however, the Court made no findings as to what benefits were obtained from the illegal conspiracy, making it impossible for the Supreme Court to evaluate the effectiveness of the decree in depriving the defendants of those benefits. As the Supreme Court stated (at pp. 127-128), "So far as the

[fol. 514] findings reveal, the theatres which are ordered divested may be properties which in whole or in part were lawfully acquired; and theatres which Schine is permitted to retain may, so far as the findings reveal, be ones which it obtained as the result of tactics violating the Act." The reason for the Supreme Court's remand of the case is stated at page 129 of its opinion:

> But an even more direct method of causing appellants to surrender the gains from their conspiracy is to require them to dispose of theatres obtained by practices which violate the antitrust acts. We do not know what findings on that score would be supported by the record, for the District Court did not address itself to the problem. The upshot of the matter is that the findings do not reveal what the rewards of the conspiracy were; and consequently the court did not consider what would be the preferable way of causing appellants to surrender them. The case must therefore be remanded so that the District Court may make appropriate findings on this phase of the case.

Insofar as the *Schine* case is at all pertinent to the issue in this case, its value lies in the fact that it held that not only are properties which are a *part* of an illegal combination subject to divestiture, but also that the *fruits* of such a conspiracy must be divested as well. Of similar effect is the case of *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, decided by the Supreme Court on the same day as the *Schine* case.

The *Paramount Pictures* case involved a conspiracy to restrain and monopolize interstate trade in the distribution and exhibition of motion picture films. As part of its decree, the District Court ordered disaffiliation in all cases of joint ownership of theatres by an exhibitor-defendant and an independent where the interest of the exhibitor-defendant was greater than five percent but less than ninety-five percent. In so doing, it was conceded that "the District Court made no inquiry into the circumstances

under which a particular interest had been acquired. It treated all relationships alike, insofar as the disaffiliation provision of the decree is concerned." (Id. at 152). The Court found that some of the cases of joint ownership "involve no more than innocent investments by those who [fol. 515] are not actual or potential operators," (Id. at 153) and remanded the case for further findings on the nature and effect of the joint ownership in each case. In so doing, however, the Court did not hold that after-acquired property could not be the subject of divestiture. On the contrary, it listed at least three circumstances under which such property should be divested:

> We have gone into the record far enough to be confident that at least some of these acquisitions by the exhibitor-defendants were the products of the unlawful practices which the defendants have inflicted on the industry. To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested. . . . Moreover, even if lawfully acquired, they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified. . . .
>
> Furthermore, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. .

Far from being opposed to the position advanced by the Government in these proceedings, the *Schine* and *Paramount Pictures* cases actually support that position. The Government does not contend that all El Paso property should be divided between it and the New Company without regard to the manner or effect of its acquisition, nor do we contend even that allocation should be made of all reserves acquired since the merger. Rather, the demand for an allocation is made with respect only to that specific

block of gas reserves acquired since the merger which, by reason of its location, can be said with certainty to have been an object of competition had it not been for the merger. To fail to provide for an allocation of those reserves would be to permit El Paso to retain the benefits obtained through the unlawful elimination of that competition and would be contrary to the admonition of the Supreme Court in the *Schine* and *Paramount Pictures* cases. Moreover, to permit El Paso to preclude Pacific Northwest (New Company) from obtaining any part of these reserves, which are the [fol. 516] closest to the California market, would be to permit it to impede through that device the ability of the New Company to serve the California market and thus permit these reserves to be "utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends" of the illegal merger, which would again be contrary to the *Paramount Pictures* holding.

The case of *Reynolds Metals Company* v. *F. T. C., supra,* is readily distinguishable from the case at bar. Reynolds had acquired a company engaged in the florist foil business, a company which engaged in business on leased premises only. After the acquisition, Reynolds built a $500,000 plant into which Arrow, the acquired company, moved and from which it operated. The Commission had originally ordered Reynolds to divest itself of all interests in Arrow, including the new plant. Upon Reynolds' request to modify the order, the Commission responded that the after-acquired property need not necessarily be divested "if an alternative method of restoring Arrow's former independent competitive standing could be found." 309 F. 2d at 231. The Court's holding that the plant need not be divested is based, not on any Constitutional prohibition against divestiture of after-acquired property, but on the failure of the record before it to demonstrate "(1) any nexus between continued possession of after-acquired property . . . and the violation of Section 7, and (2) that restoration of the competitive status quo compels divestiture of such property." 309 F. 2d at 231.

So far as appears from a reading of the briefs and opinion in the Court of Appeals, the proof in the *Reynolds* case

was quite different from what we have here. Here, unlike *Reynolds*, we have a clear "nexus" between El Paso's acquisition of the disputed San Juan reserves and its elimination of the only substantial competitor for those same reserves. As has been shown, to permit El Paso to retain all of these reserves would allow it to retain the fruits of its illegal [fol. 517] conduct. It would also give to El Paso a decided advantage in competing to serve new increments of demand in the California market, and thus would fail to restore the competitive status quo as it existed at the time of the merger.

Demonstrating that divestiture of after-acquired property is appropriate where a nexus is established between the property and the Section 7 violation is the case of *United States* v. *Aluminum Company of America*, the decision on the merits of which is reported at 233 F. Supp. 718 (E. D. Mo. 1964). That case involved the acquisition by Alcoa of the stock of the Cupples Products Corporation, a corporation engaged in the fabrication of aluminum curtain wall and various other aluminum products. Subsequent to the acquisition, Alcoa built at Corona, California a plant for the fabrication of aluminum curtain wall, retaining ownership of the plant in its own name. Cupples, which remained a separate, though subsidiary, corporation, supervised the design and construction of the plant, and the plant manager and several others engaged in the operation of the plant were Cupples employees. The principal issue in the divestiture hearing was whether the Court, in addition to ordering divestiture by Alcoa of the Cupples stock, could order divestiture of the Corona plant which had been built by Alcoa subsequent to the acquisition of the interest in Cupples.

At the hearing, the defendants' evidence was directed primarily at showing that (1) no special technology is involved in building an aluminum fabricating plant and (2) that Alcoa could use the Corona plant for fabricating other products than those that were made by Cupples. They argued that in no reported decisions of the courts or the

F. T. C. had the acquiring company been required to divest itself of after-acquired property, and relied heavily on the *Reynolds Metals* case, *supra*.

[fol. 518] The Government's evidence went toward establishing that (1) the Corona plant had been planned and built specifically by Cupples and (2) retention of the plant by Alcoa would permit it to retain fruits of its illegal acquisition of Cupples and would not eliminate the anticompetitive tendencies found by the court to exist in Alcoa's acquisition of Cupples.

Under the final judgment entered by the Court on December 4, 1964, without opinion, Alcoa is required within one year to divest itself of (1) the Corona plant and (2) all interest in Cupples.

The *Alcoa-Cupples* case is therefore direct authority for the divestiture of after-acquired property where necessary for complete relief in a Section 7 case. In fact, the issue was much more clearly presented in that case than it is here, since Cupples was still a separate corporation and could have acquired the plant in its own name if that had been the intention. In this case, since Pacific Northwest had no separate identity subsequent to the merger, it may be presumed that some portion of the reserves acquired by El Paso subsequent to that date were acquired for the benefit of the Northwest Division and divestiture of a fair share of those reserves may be supported on that ground alone.

Conclusion

Divestiture to the New Company of a fair share of the San Juan reserves acquired subsequent to the merger of Pacific Northwest is supported by the law and by the facts of this case.

Respectfully submitted,

/s/ Larry L. Williams
/s/ Jack L. Lipson
/s/ Lawrence F. Noble

Dated: January 5, 1965

[fol. 524]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

No. C 143-57

UNITED STATES OF AMERICA,

v.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION.

Take Notice that the above-entitled case has been set for Further Hearing at Salt Lake City, Utah, on Monday, January 18th, 1965, at 10:00 A.M. before Honorable Willis W. Ritter.

Date January 7th, 1965

Andrew John Brennan, Clerk, By D. Scott, Deputy Clerk.

To

Wm. T. Thurman, Esq., U. S. Attorney, 200 P. O. & Courthouse Bldg., Salt Lake City, Ut.
Gregory A. Harrison, Esq., Atherton Phleger, Esq., 111 Sutter St., San Francisco, California
Van Cott, Bagley, Cornwall & McCarthy, 141 East 1st South, Salt Lake City, Utah
Ray, Quinney & Nebeker, Deseret Bldg., Salt Lake City, Utah
Arthur H. Dean, Esq., 48 Wall Street, New York City, New York
Leon M. Payne, 2200 Gulf Bldg., Houston, 2, Texas
Jack Lipson, Esq., Department of Justice, Washington, D. C.

[fol. 524a]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 8, 1965

1. Notice is hereby given that The State of California by and through its Special Counsel William M. Bennett, Applicant for Leave to intervene herein, hereby appeals to the Supreme Court of the United States from the order denying its application to intervene, orally entered in this action on December 8, 1964.

The appeal is taken pursuant to 15 U.S.C.A. Sec. 29.

2. The clerk will please prepare and certify a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

a. The Application for Leave to Intervene of the State of California dated July 20, 1964, and filed herein July 22, 1964;

b. El Paso Natural Gas Company Proposal for Divestiture filed October 15, 1964;

[fol. 524b]

c. Statement in Support of Application for Leave to Intervene filed by State of California on November 20, 1964;

d. Application for Leave to Intervene filed by the State of Oregon on May 13, 1964;

[File endorsement omitted]

e. Memorandum in Support of Application to Intervene filed by the State of Oregon on November 25, 1964;

f. Memorandum of Defendant, El Paso Natural Gas Company, in Opposition to Applications and Motions to Intervene filed November 25, 1964;

g. Request for Ruling Upon Petition to Intervene by State of California pursuant to Rule 24(a)(2), 24(a)(3) and 24(b)(2) of the FRCC, or a Stay of the Proceedings Herein Pending Such Ruling filed by the State of California on December 8, 1964;

h. Motion that Court, Ex Parte, Issue Its Written Order to be Entered in Clerk's Docket in Final Determination of the Petition to Intervene of State of California and on Request of the State of California for a Ruling on said Petition and for a Stay Pending the Ruling Thereon;

i. Statement of William M. Bennett, in Support of Motion.

[fol. 524c]

j. Transcript of the reporter's transcript of proceedings herein for October 19, 1964, and for December 2, 3, 4, 8, 9, 10 and 11, 1964.

3. The following questions are presented by this appeal;

a. Whether the court should have permitted the State of California to intervene herein pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure.

b. Whether the court should have permitted the State of California to intervene herein pursuant to Rule 24(a)(3) of the Federal Rules of Civil Procedure.

c. Whether the court should have permitted the State of California to intervene herein pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure.

d. Whether the Supreme Court of the United States, pursuant to its plenary powers of supervision over federal courts, and pursuant to the specific mandate in United States of America vs. El Paso Natural Gas Company, 376 U.S. 651, decided on April 6, 1964, wherein the court directed the District Court to order divestiture without delay." should now review the proceedings herein to determine whether [fol. 524d] or not the mandate of this court is being obeyed.

William M. Bennett, Special Counsel for the People of the State of California.

[fol. 525]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

[Title omitted]

Judge Ritter
C 143-57

MINUTES—January 14, 1965

In chambers, in the presence of William T. Thurman, Esq., United States Attorney, the court stated that Larry L. Williams, Esq., having been authorized to speak on behalf of the government and El Paso Natural Gas Company, had requested an additional week in which to exchange communications with respect to the disposition of this matter; further reporting that the talks, to date, had been fruitful.

The court ordered continuance of the hearing to Monday, January 25, 1965 at 10:00 a.m.; thereby vacating the setting of January 18, 1965.

cc:

Jack Lipson, Esq., Dept. of Justice, Washington, D. C.
William T. Thurman, Esq., U. S. Attorney, 200 Post Office & Courthouse Bldg., SLC
Gregory A. Harrison, Esq., 111 Sutter Street, San Francisco, California
Van Cott, Bagley, Cornwall and McCarthy, 141 East 1st South, Suite 300, SLC
Arthur H. Dean, Esq., Sullivan and Cromwell, 48 Wall Street, N. Y.
Leon M. Payne, Esq., 2200 Gulf Bldg., Houston, 2, Texas
Ray, Quinney and Nebeker, 300 Deseret Bldg., SLC

[fol. 526]

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

SALT LAKE CITY, UTAH

January 15, 1965

Further Notice for Hearing on January 18, 1965, That Said Hearing Was Vacated

To:

Jack Lipson, Esq., Dept. of Justice, Washington, D. C.
William T. Thurman, Esq., U. S. Attorney, 200 Post Office & Courthouse Bldg., SLC
Gregory A. Harrison, Esq., 111 Sutter Street, San Francisco, California
Van Cott, Bagley, Cornwall and McCarthy, 141 East 1st South, Suite 300, SLC
Arthur H. Dean, Esq., Sullivan and Cromwell, 48 Wall Street, N. Y.
Leon M. Payne, Esq., 2200 Gulf Bldg., Houston, 2 Texas
Ray, Quinney and Nebeker, 300 Deseret Bldg., SLC

Re: C 143-57

UNITED STATES OF AMERICA,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

Please Take Notice, that the Hearing in this matter set for Monday, January 18, 1965 at 10:00 a.m. Has Been Vacated and continued to Monday, January 25, 1965 at 10:00 A. M.

Andrew John Brennan, Clerk, By hs, Deputy Clerk.

[fol. 527]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 15, 1965

I

Notice is hereby given that the State of Oregon ex rel. Public Utility Commissioner of Oregon, applicant for intervention in the above-entitled matter, hereby appeals to the Supreme Court of the United States from the final order denying the intervention of the State of Oregon ex rel. Public Utility Commissioner of Oregon entered in this action on a date not ascertainable from the civil docket herein, actual notice of which entry came to the State of Oregon ex rel. Public Utility Commissioner of Oregon on January 6, 1965.

This appeal is taken pursuant to section 2 of the Expediting Act of February 11, 1902, 32 Stat. 823, as amended, 15 U.S. Code § 29.

II

The clerk will please prepare a transcript of the record of this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 528] 1. The application of the State of Oregon ex rel. Public Utility Commissioner of Oregon for leave to intervene bearing date May 11, 1964, and filed with the Court on or about May 12, 1964.

[File endorsement omitted]

2. The plan of divestiture proposed by the El Paso Natural Gas Company and filed with the Court on or about October 15, 1964.

3. The memorandum of the State of Oregon ex rel. Public Utility Commissioner of Oregon filed with the Court on or about November 24, 1964,

4. Pages 7 through 11 of the transcript of testimony taken on December 2, 1964.

5. Pages 352 through 355 of the transcript of testimony taken on December 8, 1964.

6. A copy of that portion of the civil docket in the within proceeding showing all entries made therein on and after April 6, 1964.

The attention of the Clerk is called to the Notice of Appeal heretofore filed herein by the State of California and to Rule 12 (5) of the Rules of the Supreme Court, Title 28 USCA with respect to duplication of the record.

III

The following questions are presented on this appeal:

1. Whether or not a sovereign state may intervene as a matter of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure in an antitrust proceeding against a public utility engaged in the interstate transportation of natural gas, such utility furnishing all of the natural gas consumed within such state;

2. Whether or not the denial of such intervention constitutes an abuse of discretion under the provisions of Rule [fol. 529] 24(b)(2) of the Federal Rules of Civil Procedure.

Robert Y. Thornton, Attorney General of Oregon,
Richard W. Sabin, Assistant Attorney General of Oregon, Of Attorneys for the State of Oregon ex rel. Public Utility Commissioner of Oregon.

Office and Post Office Address: 103 Public Service Building, Salem, Oregon 97310.

[fol. 530] Proof of Service (omitted in printing).

[fol. 531a]

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

SALT LAKE CITY, UTAH

January 15, 1965

Notice to Counsel That Notice of Appeal to the Supreme Court of the United States Was Filed by the State of Oregon

To:

William T. Thurman, Esq., U. S. Attorney, 200 U. S. Post Office and Courthouse, Salt Lake City, Utah

Jack L. Lipson, Esq. and Larry L. Williams, Esq., Antitrust Division, Department of Justice, Washington 25, D. C.

Gregory A. Harrison, Esq., Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco, California

Dennis McCarthy, Esq., Van Cott, Bagley, Cornwall & McCarthy, 65 South Main, Salt Lake City, Utah

Leon M. Payne, Esq., Andreus, Keith, Campbell & Jones, 25th Floor Humble Building, Houston, Texas

A. H. Nebeker, Esq., Ray, Quinney & Nebeker, 300 Deseret Building, Salt Lake City, Utah

Arthur H. Dean, Esq., Sullivan & Cromwell, 48 Wall Street, New York, N. Y.

Re:

UNITED STATES OF AMERICA,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

C 143-57

Please Take Notice that Notice of Appeal to the Supreme Court of the United States was filed by the State of Oregon ex rel. Public Utility Commissioner of Oregon, on the 19th day of January, 1965 and entered in the Docket as of the 15th day of January, 1965.

Copy of the Notice of Appeal is enclosed.

Andrew John Brennan, Clerk, By: Ruth Bailey, Deputy Clerk.

cc:

William M. Bennett, Esq., Special Counsel for the People of the State of California, Room 5068, State Building, San Francisco, California

Richard Sabin, Esq., Assistant Attorney General, State of Oregon, Public Utilities Commission, 103 Public Service Building, Salem, Oregon 97310

[fol. 532]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF PARADOX PRODUCTION CORPORATION FOR LEAVE TO APPEAR AS AMICUS CURIAE —January 22, 1965

On November 17, 1964, the Paradox Production Corporation, a Nevada corporation, filed an Amendment of Application for Leave to Intervene by adding thereto an alternative application for leave to appear as Amicus Curiae.

The Application and the files and records have been duly considered and, good cause appearing, it is

Ordered that the Application be and the same is Denied upon the grounds and for the reasons stated in the Court's Memorandum Opinion Denying Applications, Motions and Petitions to Intervene or to Appear as Amicus Curiae, filed this date.

Willis W. Ritter, District Judge.

[fol. 533]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA FOR LEAVE TO APPEAR AS AMICUS CURIAE—January 22, 1965

On December 14, 1964, the Public Utilities Commission of the State of California filed a Motion for Leave to Appear in this action as Amicus Curiae.

The Motion and the files and records have been duly considered and good cause appearing, it is

Ordered that the Motion be and the same is Denied upon the grounds and for the reasons stated in the Court's Memorandum Opinion Denying Applications, Motions and Petitions to Intervene or to Appear as Amicus Curiae filed this date.

Willis W. Ritter, United States District Judge.

[fol. 534]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF WYOMING FOR LEAVE TO APPEAR AS AMICUS CURIAE—January 22, 1965

On December 2, 1964, the Public Service Commission of Wyoming filed an Application for Leave to Amend Its Application to Intervene in this action to include an Application to Appear as Amicus Curiae, if its Application for Leave to Intervene is denied.

The Motion and the files and records have been duly considered and good cause appearing, it is

Ordered That the Motion be and the same is Denied upon the grounds and for the reasons stated in the Court's Memorandum Opinion Denying Applications, Motions and Petitions to Intervene or to Appear as Amicus Curiae, filed this date.

Willis W. Ritter, United States District Judge.

[fol. 535]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE INTERMOUNTAIN GAS COMPANY FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Intermountain Gas Company for leave to intervene in support of the El Paso Natural Gas Company plan for divestiture and only if the applications to intervene of those in opposition to said plan are granted in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

[fol. 536] This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

[File endorsement omitted]

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 537]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

[Title omitted]

Civil No. 143-57

ORDER DENYING APPLICATION OF THE UTAH PUBLIC SERVICE COMMISSION FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24 (A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Utah Public Service Commission for leave to intervene in support of the El Paso Natural Gas Company plan for divestiture and only if the applications to intervene of those in opposition to said plan are granted in the above-entitled action came on for hearing;

[File endorsement omitted]

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

[fol. 538] This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 539]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE WASHINGTON WATER POWER COMPANY FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Washington Water Power Company for leave to intervene in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

[fol. 540] No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this appli-

[File endorsement omitted]

cant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule (B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 541]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE WASHINGTON NATURAL GAS COMPANY FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Washington Natural Gas Company for leave to intervene in support of the El Paso Natural Gas Company plan for divestiture and only if the applications to intervene of those in opposition to said plan are granted in the above-entitled action came on for hearing;

[File endorsement omitted]

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

[fol. 542] This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 543]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE WYOMING PUBLIC SERVICE COMMISSION FOR LEAVE TO INTERVENE OR TO APPEAR AS AMICUS CURIAE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Wyoming Public Service Commission for leave to intervene in support of the El Paso Natural Gas Company plan for divestiture and only if the applications to intervene of those in opposition to said plan are granted or in the alternative to appear as amicus curiae in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

[fol. 544-545] This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

[File endorsement omitted]

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action;

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 546]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE UTAH GAS SERVICE COMPANY FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Utah Gas Service Company for leave to intervene in support of the El Paso Nat-

[File endorsement omitted]

ural Gas Company plan for divestiture and only if the applications to intervene of those in opposition to said plan are granted in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

[fol. 547] This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action;

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 548]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE MOUNTAIN FUEL SUPPLY COMPANY FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Mountain Fuel Supply Company for leave to intervene in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

[fol. 549] No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this

[File endorsement omitted]

applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 550]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE NORTHWEST NATURAL GAS COMPANY FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company,* 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Northwest Natural Gas Company for leave to intervene in support of the El Paso Natural Gas Company plan for divestiture and only if the applications to intervene of those in opposition to said

[File endorsement omitted]

plan are granted in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

[fol. 551] This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 552]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE SOUTHERN CALIFORNIA GAS COMPANY FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Southern California Gas Company for leave to intervene in support of the El Paso Natural Gas Company plan for divestiture and only if the applications to intervene of those in opposition to said plan are granted in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

[fol. 553] This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

[File endorsement omitted]

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 554]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE SOUTHWEST GAS CORPORATION FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States v. El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Southwest Gas Corporation for leave to intervene in support of the El Paso Natural Gas Company plan for divestiture and only if the applications to intervene of those in opposition to said plan are granted in the above-entitled action came on for hearing;

[File endorsement omitted]

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

[fol. 555] This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 556]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE STATE OF WASHINGTON, BY THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION FOR LEAVE TO INTERVENE OR TO APPEAR AS AMICUS CURIAE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company,* 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The State of Washington, by the Washington Utilities and Transportation Commission for leave to intervene or in the alternative to appear as amicus curiae in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

[fol. 557] On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

[File endorsement omitted]

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 558]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE PARADOX PRODUCTION CORPORATION FOR LEAVE TO INTERVENE OR TO APPEAR AS AMICUS CURIAE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Paradox Production Corporation for leave to intervene or in the alternative to appear as amicus curiae in the above-entitled action came on for hearing;

[File endorsement omitted]

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

[fol. 559] On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(?) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 560]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE STATE OF OREGON, EX REL., PUBLIC UTILITY COMMISSIONER OF OREGON FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The State of Oregon, *ex rel.*, Public Utility Commissioner of Oregon for leave to intervene in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

[fol. 561] No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this

[File endorsement omitted]

applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 562]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE NEVADA PUBLIC SERVICE COMMISSION FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Nevada Public Service Commission for leave to intervene in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

[File endorsement omitted]

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

[fol. 563] No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 564]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE PACIFIC GAS AND ELECTRIC COMPANY FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of the Pacific Gas and Electric Company for leave to intervene in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

[fol. 565] No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

[File endorsement omitted]

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 566]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE CASCADE NATURAL GAS COMPANY FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States v. El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Cascade Natural Gas Company for leave to intervene in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this

Court its written statement of evidence, law, and argument in support of said application;

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

[fol. 567] No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 568]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE SOUTHERN COUNTIES GAS COMPANY FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Southern Counties Gas Company for leave to intervene in support of the El Paso Natural Gas Company plan for divestiture and only if the applications to intervene of those in opposition to said plan are granted in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

[fol. 569] This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

[File endorsement omitted]

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 570]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE STATE OF IDAHO, EX REL., IDAHO PUBLIC UTILITIES COMMISSION FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States v. El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The State of Idaho, *ex rel.*, Idaho Public Utilities Commission for leave to intervene in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this

[File endorsement omitted]

Court its written statement of evidence, law, and argument in support of said application;

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

[fol. 571] No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 572]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE PUBLIC UTILITY COMMISSION OF THE STATE OF CALIFORNIA FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States v. El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of The Public Utility Commission of the State of California for leave to intervene in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

[fol. 573] No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this

[File endorsement omitted]

applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 574]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING APPLICATION OF THE PEOPLE OF THE STATE OF CALIFORNIA FOR LEAVE TO INTERVENE—January 22, 1965

This action came on for hearing in this Court in order to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of the People of the State of California, appearing by Special Counsel, for leave to intervene in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this

[File endorsement omitted]

Court its written statement of evidence, law, and argument in support of said application;

[fol. 575] This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, It Is Ordered that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, Denied.

Willis W. Ritter, Chief United States District Judge.

[fol. 576]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants.

MEMORANDUM OPINION OF THE COURT DENYING APPLICATIONS, MOTIONS AND PETITIONS TO INTERVENE OR TO APPEAR AS AMICUS CURIAE—January 22, 1965

After hearing in this court in a proceeding to frame a decree of divestiture pursuant to *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964), a consideration of the oral arguments, files and records, and the various "motions", "applications" and "petitions", it is

Ordered that the motions, applications and petitions be and they hereby are Denied upon the grounds and for the reasons set forth in the memorandum of defendant El Paso Natural Gas Company filed November 25, 1964, which the Court hereby adopts as his Memorandum Opinion.

"There are now twenty strangers to this litigation seeking to become parties by "motions" and "applications" to intervene. Their claims to the rights of parties, including the right to appeal from a final divestiture decree, come long after the trial and entry of the judgment, which was reversed by the Supreme Court upon an opinion requiring "divestiture without delay". Every issue on the merits between plaintiff and El Paso has been finally adjudicated.

All that remains is to fashion a divestiture decree which complies with the mandate of the Supreme Court.

Intervention is opposed by both El Paso and the United [fol. 577] States (Tr. 79, 109).[1]

The score of applicants and movants for intervention consist of the public utilities commissions of seven states,[2] the State of California (as distinguished from its public utilities commission), eleven natural gas distributing companies,[3] and Paradox Production Corporation, whose claim rests upon the astonishing assertion that it is entitled to intervene because it wishes to purchase the assets of which El Paso is to be divested.

The positions of these movants and applicants are in hopeless conflict; they reflect disputes among the would-be intervenors *inter se* respecting their conception of what will serve the "convenience and necessity" of the natural gas consumers they have undertaken to represent. The anti-trust questions before the Court are paramount to such matters.

[fol. 578] The Utah and Wyoming Public Service Commissions, and seven distributing companies,[4] support El

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[1] "Tr. " refers to the transcript of the hearing held on October 19, 1964, at which the would-be intervenors in attendance were allowed until November 19, 1964, to file briefs in support of their motions and applications to intervene, which were then continued for hearing to December 2, 1964.

Italicized quoted matter has been supplied, except where otherwise indicated.

[2] California, Idaho, Nevada, Oregon, Utah, Washington and Wyoming.

[3] Cascade Natural Gas Corporation, Intermountain Gas Company, Mountain Fuel Supply Company, Northwest Natural Gas Company, Pacific Gas and Electric Company, Southern California Gas Company, Southern Counties Gas Company of California, Southwest Gas Corporation, Utah Gas Service Company, Washington Natural Gas Company and Washington Water Power Company.

[4] Intermountain Gas Company, Northwest Natural Gas Company, Southern California Gas Company, Southern Counties Gas Company of California, Southwest Gas Corporation, Washington Natural Gas Company and Utah Gas Service Company.

Paso's plan for divestiture. They ask to intervene only if the motion of another is granted.

The regulatory commissions of California, Idaho and Nevada, and Mountain Fuel Supply Company and Washington Water Power Company, confine themselves to claims of a right to represent consumers in their states and have taken no position on El Paso's plan. The Nevada commission would intervene only if the application or motion of another is granted.

Dissatisfaction with various details of El Paso's divestiture plan is alleged by the Oregon and Washington commissions, the State of California (as distinguished from its public utilities commission) and Cascade Natural Gas Company. Of course, Paradox Production opposes El Paso's plan because the plan does not contemplate a sale of assets to Paradox.

Pacific Gas and Electric Company appears to contend simply that this Court has no jurisdiction over the details of the divestiture ordered by the Supreme Court.

II.

No One is Entitled to Intervene as of Right

In this Court the requirements of Rule 24 govern intervention. The Rule requires that an applicant be permitted [fol. 579] to intervene only upon a "timely application" showing that:

(1) a statute of the United States confers an unconditional right to intervene,

(2) the representation of the applicant's "interest" by the existing parties is or may be inadequate *and* the applicant is or may be bound by the judgment, or

(3) the applicant will be adversely affected by disposition of property subject to the control of the Court.

A. None of the Applications or Motions is "Timely".

Rule 24 requires expressly that an application to intervene be "timely". The fact that each of the motions and applications before the Court was filed long after judgment was entered is itself a sufficient basis for denial.

Basle Theatres, Inc. v. *Warner Bros. Pictures Distr. Corp.*, 24 F.R.D. 476 (W.D. Pa. 1959), was a movie antitrust case in which would-be intervenors filed their applications after an appeal from the judgment had been dismissed in the course of settlement. The Court held (p. 477):

> "Where there is substantial litigation, tardy intervention will usually be denied. Intervention after judgment is unusual and not often granted. See Vol. 4, Moore's Federal Practice, §24.13. . . .
>
> ". . . as we have pointed out, the case has been concluded; a decree entered; and the parties have reached an amicable settlement and dismissed their appeal. The applicants for intervention here have in effect slept on their rights, and now they want this Court in effect to administer the motion picture industry in the distribution of motion pictures in Western Pennsylvania."

[fol. 580] Intervention was denied.

B. No Movant or Applicant Has Shown the "Interest" Required for Intervention.

Rule 24 requires that a would-be intervenor demonstrate at the outset an "interest" in the subject of the action. The commission and distributor movants and applicants allege the same general "interests", except for Paradox Production Corporation which has none at all (*infra* p. 1148).

The state regulatory commissions each allege an "interest" in asserting the conflicting claims of gas consumers in

their states regarding the New Company to be created by divestiture. The distributing companies also volunteer to protect the "interests" of their consumer customers and, of course, their own economic well being.

Such matters cannot prevail over *antitrust* requirements in this case. The Federal Power Commission held that the merger of Pacific Northwest into El Paso was supported by regulatory considerations of public convenience and necessity. The Supreme Court did not disagree, but held, instead, in *California* v. *Federal Power Commission*, 369 U.S. 482 (1961), that such considerations give way to paramount antitrust policies under Section 7 of the Clayton Act. The approving regulatory determination of the Commission was therefore laid aside by the Supreme Court in order that the controlling *antitrust* questions might be determined.

[fol. 581] Compliance by this Court with the mandate of the Supreme Court for "divestiture without delay" should not be defeated by intrusion of collateral disputes between intervenors over questions irrelevant to the controlling requirements of the antitrust law.

This principle finds expression in an unbroken line of authorities. *Commonwealth Edison Co.* v. *Allis Chalmers Mfg. Co.*, 315 F2d 564 (7 Cir. 1963), *cert. den.* 375 U.S. 834, was an antitrust damage suit brought by Illinois public utilities companies against manufacturers of utility electrical equipment. Plaintiffs alleged that the defendants conspired to fix prices, allocate markets and the like, so that plaintiffs were overcharged for electrical equipment they purchased from defendants. The Attorney General of Illinois sought to intervene "in order to represent and protect the interests of the public consumers . . . who . . . were injured by defendants' price fixing conspiracies" (p. 566). Intervention was denied:

> "We hold that the State of Illinois as agent or parens patriae of the consumers (accepting arguendo that the State of Illinois can properly assume such role) or

even the consumers themselves do not have any direct personal or pecuniary interest in these antitrust actions. Our holding renders moot any discussion of the existence of the subsumed secondary elements. The rationale for our holding follows.

The interests of plaintiffs and the consumers are different and arise from separate though related operative facts. The legal interest of plaintiffs which they are attempting to vindicate in these actions arises under the federal antitrust statutes. The damages, if any, to which they are entitled are measured by the hurt they may have suffered by reason of the alleged conspiracies claimed to be violative of the antitrust laws. That hurt is measured by the excessive prices they claim were paid for equipment purchased from defendants. The alleged conspiracies spent themselves on these purchasers. The aftereffects of the hurt on [fol. 582] the consumers are consequential and too remote for the consumers to gain rights against the conspirators.

The consumers' rights, if any, to reparation for their consequential hurt arise from higher rates and charges for services provided by plaintiffs. That is the proximate cause of their injury, not the antitrust violation. See Keogh v. C. & N. W. Ry. Co., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). *The consumers' rights do not penetrate through to the antitrust conspiracies.*"

This is well supported by Supreme Court authorities.

Pipeline Co. v. *United States,* 312 U.S. 502 (1941), was an action by the government to enjoin activities by defendant utilities alleged to have eliminated Panhandle Eastern Pipeline Company from competing for the Detroit market. A consent decree had been entered. It expressly permitted Panhandle Eastern to become a party to enforce specified rights given it by the decree. Upon reopening to modify the consent decree, Panhandle Eastern was held

entitled to intervene under these decree provisions but not to have a sufficient interest to intervene under Rule 24.

In *Allen Co.* v. *Cash Register Co.*, 322 U.S. 137 (1944), National Cash Register Co. had earlier been enjoined from acquiring a competitor without approval of the Court. It petitioned for Court permission to acquire Allen Co. The government opposed and Allen itself sought to intervene. The intervention application was held properly denied because Allen would not be bound by the decision of National Cash Register's petition and had no interest in the distribution or disposition of property in the Court's custody within the meaning of Rule 24. *Pipeline Co.* v. *United States* was distinguished as turning upon decree provisions entitling Panhandle Eastern to become a party.

[fol. 583] *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951), an offshoot of *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948), is in point. After the Supreme Court decided the *Paramount* case, defendant Warner Brothers was ordered "reorganized" into two companies in a manner similar to divestiture. Sutphen Estates had leased property to a Warner affiliate and Warner had guaranteed the lessee's performance of the lease. The lessor sought to intervene to protect its rights against Warner as guarantor. It was held to have no right to do so because the lessor was not "a privy of Warner" and the "reorganization" decree would not bind the lessor in any legal sense. The Supreme Court recognized, however, that lessor had an interest in property subject to Court disposition within Rule 24 (a) (3). It rejected this "interest" as a basis for interference with *antitrust* relief by way of intervention in this language, which disposes of the motions and applications now before the Court (p. 22):

> "We do not think, however, that on this record appellant has shown that it will be 'adversely affected' by the reorganization within the meaning of Rule 24 (a) (3). . . . We hold only that appellant has not maintained the burden of showing that under Rule 24 (a) (3) it may intervene as of right."

The well-settled rule that paramount antitrust considerations cannot be defeated through intrusion of "interests" resting upon other grounds was sustained in *Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961). The United States sued ASCAP to restrain practices allegedly injurious to competition for the artistic works of ASCAP members. After entry of a consent decree, certain publisher members of ASCAP sought to intervene in modification proceedings. The Court held they had no interest within Rule 24 (p. 689):

> [fol. 584] "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it."

The Court buttressed this conclusion with a warning that intervention ought not "to subvert":

> "... the unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the government ..." (p. 693).

See also the opinions in *United States* v. *duPont & Co.*, reported at 13 F.R.D. 487 (N.D. Ill. 1953) and 1962 Trade Cases, para. 70,245 (N.D. Ill. 1962), both denying stockholders' petitions to intervene brought at various stages of the case.

These authorities dispose of the contention that the applicants and movants here have an "interest" within Rule 24 entitling them to intervene and the related assertion that they would be "bound" by the final divestiture decree in the legal sense required by the Rule. We turn to the claim that the public interests the would-be intervenors have volunteered to represent are not adequately protected by the Department of Justice.

C. The Public Interest Is Adequately Represented By The Department of Justice.

Each movant and applicant claims, in one way or another, that its interests and the interests of the consumers it seeks to represent will not be adequately represented by the Department of Justice as counsel for the United States.

Analysis of this claim requires reiteration, at the outset, of what the controlling interests and issues *are* and what [fol. 585] they are not. In its first decision involving this matter, *California* v. *Federal Power Commission*, 369 U.S. 482 (1961), the Supreme Court held, as we have seen, that *antitrust* requirements take precedence over and govern regulatory determinations by the Federal Power Commission of what the public convenience and necessity requires. The Department of Justice represents the United States here in giving effect to those controlling antitrust considerations delineated by the Supreme Court in its application of Section 7 of the Clayton Act to this case. The complaint of the eighteen state commissions and distributing companies seeking to intervene is not that the attorneys for the United States are inadequate to the antitrust task. The claim *is*, instead, that the United States Attorney and Department of Justice *will* give the precedence to antitrust requirements required by the Supreme Court and in the process neglect the conflicting conceptions of the would-be intervenors as to what the convenience and necessity of their consumers might otherwise dictate.[8]

We note in passing that the moving state commissions could not claim a right to intervene upon assertions of jurisdiction to regulate the activities of the New Company to be organized pursuant to El Paso's plan. The facilities the New Company will operate are interstate in nature, as

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[8] It is remarkable that one of the attorneys for California who protested the paramount importance of antitrust considerations before the Supreme Court in *California* v. *Federal Power Commission* now reverses his position and seeks to subvert antitrust considerations to other matters.

were the facilities of Pacific Northwest, and the jurisdiction of the Federal Power Commission to regulate them [fol. 586] is exclusive [15 USC §717 (b); see *Panhandle Eastern Pipeline Co.* v. *P.S.C. of Indiana,* 332 U.S. 507 (1947); *F.P.C.* v. *Transcontinental Gas Corp.,* 365 U.S. 1 (1960), and authorities cited]. It is clear, in any event, that the regulatory process must take place in commission proceedings *after divestiture* upon rates and other matters with which this Court is not concerned. To intertwine antitrust and regulatory interests would defeat the orderly accomplishment of both.

The proof of this pudding is in the position assumed here by the Federal Power Commission. It participates *amicus curiae* upon a statement which says the Commission has no wish to become a party. In this the Commission recognizes that it is for this Court to fashion a divestiture decree in conformity with the antitrust requirements of the Supreme Court's mandate and for the Commission, when divestiture has been effected, to concern itself with regulatory matters unrelated to the Court's duties in respect of Section 7. If the twenty applicants and movants here were entitled to intervene upon the grounds they allege, then every consumer of natural gas in the western United States would be similarly entitled upon like grounds, and performance by this Court of its duties prescribed by the Supreme Court mandate would become practically impossible. See, for example, *New York City* v. *New York Telephone,* 261 U.S. 312 (1923), and *In Re Engelhard,* 231 U.S. 646 (1914), denying telephone subscribers' petitions to intervene in actions relating to rates in which state commissions were parties.

The right and duty of the United States Attorney and Department of Justice to represent the United States, and [fol. 587] therefore the interests of all citizens, is statutory (28 USC §507). The Supreme Court has accordingly held, in *United States* v. *Paramount Pictures,* 334 U.S. 131, 177 (1948):

"The complaint of the [would-be] intervenors was directed towards the system of competitive bidding. The Department of Justice is the representative of the public in these antitrust suits. So far as the protection of the public interest in free competition is concerned the interests of those intervenors was adequately represented."

D. Applicants Have No Interest In El Paso's Property Entitling Them To Intervene.

None of the would-be intervenors has an interest in the assets to be divested which would authorize intervention under subdivision (3) of Rule 24 (a). This statement from Moore accurately summarizes the authorities:

"What kind of an interest must a petitioner have in property subject to the control of a Court before he can claim an absolute right to intervene? *Obviously it must be an interest known and protected by the law*: A claim of ownership, or a lesser interest sufficient and of the type to be denominated a lien equitable or legal." (4 Moore's Federal Practice, para. 24.09, p. 45).

See also the analysis in *Archer* v. *United States*, 268 F2d 687 (10 Cir. 1959).

The movants and applicants here plainly have no *legal* interest in El Paso's property. Nor do contracts between the distributors and El Paso for purchase and sale of gas vest any such interest in the moving distributing companies. It is not claimed, nor could it be, that these agreements give the distributors a *legal* interest in El Paso's gas supplies in the nature of a lien or otherwise. They have no interest respecting rates charged for gas purchased under the agreements because *rates will not be affected by divestiture;* [fol. 588] the New Company will continue the rates and other terms and conditions of service now in effect, and the Federal Power Commission will continue to regulate them.

In any event, *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951), disposes of any claimed right to intervene in an antitrust case upon assertions of economic interest in property to be divested. As we have seen (supra pp. 1139-1140), a lessor of property leased to a Warner Brothers subsidiary upon a lease guaranteed by Warner Brothers was denied intervention in an antitrust action in which Warner Brothers had been ordered divided into two companies.

On this point, as on the others discussed above, most of the would-be intervenors have simply repeated the language of Rule 24 in support of a claimed right to intervene, without analysis or citation of other authority (e.g., the "Statement" of California in support of its application, dated November 19, 1964). A few applicants (e.g., Cascade Natural Gas Company in its memorandum served November 18, 1964) grapple with Sutphen Estates and other authorities upon which we rely in an effort to show that they are not inconsistent with intervention here. We submit this is unavailing and that there is no authority fairly supporting the motions and applications now before the Court.

Ford Motor Company v. *Bisanz Bros.*, 249 F2d 22 (8 Cir. 1957), is heavily relied upon by the would-be intervenors who have undertaken to discuss authorities. It is not [fol. 589] in point. The case holds only that Ford Motor Company could intervene in an action brought by property owners to terminate service by the defendant railroad to Ford's plant. Whatever difficulties there may be in reconciling this opinion of the Eighth Circuit with the Supreme Court authorities, it is clear that the Ford case did not involve the antitrust laws or other public interests entrusted to lawyers already in the case, that the issues Ford wished to raise as intervenor were of the same kind as had arisen between the parties, and that Ford's application was not presented to the Court for the first time after judgment.

Certain of the state commissions (*e.g.*, Washington commission memorandum p. 11) rely upon *Securities Commission* v. *U. S. Realty Co.*, 310 U.S. 434 (1940), as declaring a principle which would allow them to intervene as public

agencies without the interest required by Rule 24. The decision does not so hold. It decides only that the S.E.C. may intervene in Chapter XI Bankruptcy proceedings under circumstances peculiar to bankruptcy and otherwise different from those involved here. The Supreme Court based the right of the S.E.C. to intervene in Chapter XI proceedings in part upon its statutory right to intervene in proceedings under Chapter X and the General Orders in Bankruptcy; unlike the commission applicants here, the S.E.C. sought to raise the same bankruptcy issues as might have been raised between the parties. Finally, the S.E.C. sought to represent interests otherwise unrepresented in the bankruptcy case. In this case the Federal Power Commission participates as *amicus curiae* to be heard upon regulatory considerations deemed by it pertinent to the divestiture to be ordered by this Court. *The American Realty Co.* case [fol. 590] has nothing to do with intervention by a state regulatory commission to raise matters upon which a federal regulatory commission is already participating *amicus curiae.*[6]

III.

Permissive Intervention Should Be Denied

In several of the decisions analyzed above with respect to intervention as a matter of right under Rule 24 (a), a companion claim to permissive intervention under Rule 24 (b) also was denied.

No different conclusion is warranted here. Rule 24 (b) authorizes permissive intervention: (1) when a statute confers a conditional right to intervene or (2) when the applicant's claim or defense and the main action have a question of law or fact in common. No statute confers any

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[6] The related claim of the Oregon commission (Oregon commission memorandum p. 6) of a right to intervene as parens patriae of Oregon consumers is disposed of contrary to the commission's contentions by *Commonwealth Edison Co.* v. *Allis Chalmers Mfg. Co.*, 315 F2d 564 (7 Cir. 1963), *cert. den.* 375 U.S. 834, discussed supra pp. 1137-1138.

right, conditional or otherwise, to intervene here. No movant or applicant asserts any claim or defense on the merits at all because the merits have been finally decided. There is no question of fact or law the movants and applicants seek to raise in common with the antitrust matters which are the responsibility of the attorneys for the United States. On the contrary, as we have seen, the purpose of the would-be intervenors is to inject into these proceedings issues of regulatory convenience and necessity over which antitrust considerations are paramount.

[fol. 591] Rule 24 (b) also directs the Court, in determining whether to allow permissive intervention, to "consider whether the intervention will unduly delay or prejudice the adjudication" of issues between the parties. If the movants and applicants here were permitted to participate and try out the questions they seek to raise, the divestiture hearing probably would take longer to complete than the matters concluded in this litigation thus far. Intervention would make "divestiture without delay" a practical impossibility.

IV.

Other Matters Relating to California, Pacific Gas and Electric Company and Paradox Production Corporation

A. *California*

A remarkable circumstance which occurred after the hearing on October 19 last raises serious confusion regarding the authority of those who seek to intervene on behalf of the consumers of California. A "Special Attorney for the People of the State of California" filed an application to intervene dated July 20, 1964, and addressed the Court extensively at the October 19 hearing (Tr. 75, *et seq.*). After that hearing the Public Utilities Commission of California filed a motion to intervene dated November 16, 1964, over the signature of its Chief Counsel. It, too, claims authority to represent California consumers.

There is more, however, than confusion as to who is counsel for California. The statement of its "Special Attorney" and the motion of the Chief Counsel of its Public Utilities Commission are not consistent. The Special Attorney raises a series of questions regarding, and in fact appears to oppose, El Paso's divestiture plan. The California commis- [fol. 592] sion, on the other hand, appears to take no position on El Paso's plan, but seeks simply to represent the interests of California consumers upon whatever questions might arise.

B. *Pacific Gas and Electric Company*

The motion of Pacific Gas and Electric Company to intervene dated November 17, 1964, asserts the astonishing proposition that this Court lacks jurisdiction to prescribe details of the divestiture required by the mandate of the Supreme Court. P.G. and E. contends that this Court should abdicate to the Federal Power Commission on a host of matters which must be resolved to effect divestiture.[7] Although its motion cites in *California* v. *Federal Power Commission*, 369 U.S. 482 (1962), P.G. and E. appears to overlook the essential holding of the Supreme Court in that opinion, viz., that in this action preservation of the competition required by *the antitrust laws* is the paramount and governing consideration.

We submit that P.G. and E.'s motion, stripped to its bare essentials, proposes that P.G. and E. be made a party in order that it may contend that the Court lacks power to

[7] The Commission took no such position in its statement to the Court as *amicus curiae* on October 19 (Tr. 73, 74). The Washington commission, which is dissatisfied with El Paso's plan, also takes a different and correct position. In its memorandum served November 23, 1964, the Washington commission asserts (p. 4) that "it is within the jurisdiction of this court, not the Federal Power Commission, by its decree of divestiture to determine what shall be the capital structure, the balance sheet, the investment, the gas supply and other factors" relating to the New Company and essential to divestiture. The Oregon commission, in its memorandum served the same day, agrees (pp. 5, 9).

fashion the decree required by the mandate of the Supreme Court. This is itself a sufficient basis for denial.

[fol. 593] C. *Paradox Production Corporation*

As a would-be purchaser of the assets to be divested, this applicant has no interest in the action, El Paso's property or the divestiture decree. Our research has understandably failed to disclose any reported decision dealing with this type of claim to a right to intervene.

Recognizing that it has no interest within Rule 24 of any kind, Paradox, in its memorandum served on November 20, 1964, takes issue with El Paso's shareholders. This complaint, utterly unsupported by the authority Paradox cites,[8] is nothing more than a transparent effort to establish the curious proposition that the interests of the stockholders of Paradox are paramount to the antitrust requirements on which the mandate of the Supreme Court is based."

Willis W. Ritter.

[fol. 594]

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

SALT LAKE CITY, UTAH

Date: January 22, 1965

NOTICES (RULE 77(D)) MAILED TO COUNSEL OF RECORD RE MEMORANDUM OPINION

To:

Jack Lipson, Esq., Department of Justice, Washington, D. C.

Wm. T. Thurman, Esq., U. S. Attorney, 200 P. O. & Courthouse Bldg., Salt Lake City, Utah

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[8] *United States* v. *duPont*, 366 U.S. 316 (1960), final decree on remand reported in 1962 Trade Cases, para. 70,245 (N.D. Ill. 1962).

Gregory A. Harrison, Esq., 111 Sutter Street, San Francisco, California
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Leon H. Payne, Esq., 2200 Gulf Bldg., Houston 2, Texas

Re: C 143-57

UNITED STATES OF AMERICA,

—VS.—

EL PASO NATURAL GAS COMPANY and
PACIFIC NORTHWEST PIPELINE CORPORATION.

Take Notice, in accordance with Rule 77 (d) of the Federal Rules of Civil Procedure, you are hereby notified that:

Memorandum Opinion of the Court Denying Applications, Motions and Petitions to Intervene or to Appear as Amicus Curiae and Individual Orders was signed by Honorable Willis W. Ritter on the 22nd day of January, 1965; and entered in the Docket as of the 22nd day of January, 1965.

Andrew John Brennan, Clerk, By: D. Scott, Deputy Clerk.

500:11/23

[fol. 595]

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

SALT LAKE CITY, UTAH

January 25, 1965

To:

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Re: C 143-57

UNITED STATES OF AMERICA

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

[fol. 596] Take Notice, in accordance with Rule 77 (d) of the Federal Rules of Civil Procedure, you are hereby notified that the following:

Order denying Application of the People of the State of California for Leave to Intervene,
Order denying Application of the Public Utility Commission of the State of California for Leave to Intervene,
Order denying Application of the State of Idaho, ex rel. Idaho Public Utilities Commission for Leave to Intervene,
Order denying Application of The Southern Counties Gas Company for Leave to Intervene,
Order denying Application of the Cascade Natural Gas Company for Leave to Intervene,
Order denying Application of the Pacific Gas and Electric Company for Leave to Intervene,
Order denying Application of the Nevada Public Service Commission for Leave to Intervene,
Order denying Application of the State of Oregon, ex rel., Public Utilities Commission of Oregon for Leave to Intervene,
Order denying Application of the Paradox Production Corporation for Leave to Intervene or to Appear as Amicus Curiae,
Order denying Application of the State of Washington, by the Washington Utilities and Transportation

Commission for Leave to Intervene or to Appear as Amicus Curiae,

Order denying Application of the Southwest Gas Corporation for Leave to Intervene,

Order denying Application of the Southern California Gas Company for Leave to Intervene,

Order denying Application of the Northwest Natural Gas Company for Leave to Intervene,

Order denying Application of the Mountain Fuel Supply Company for Leave to Intervene,

Order denying Application of the Utah Gas Service Company for Leave to Intervene,

Order denying Application of the Wyoming Public Service Commission for Leave to Intervene or to Appear as Amicus Curiae,

Order denying Application of the Washington Natural Gas Company for Leave to Intervene,

Order denying Application of the Washington Water Power Company for Leave to Intervene,

Order denying Application of the Utah Public Service Commission for Leave to Intervene,

Order denying Application of the Intermountain Gas Company for Leave to Intervene,

Memorandum Opinion of the Court denying Applications, Motions and Petitions to Intervene or to Appear as Amicus Curiae,

[fol. 597] Order denying Application of the Public Service Commission of the State of Wyoming for Leave to Appear as Amicus Curiae,

Order denying Application of Paradox Production Corporation for Leave to Appear as Amicus Curiae,

Order denying Application of the Public Utilities Commission of the State of California for Leave to Appear, as Amicus Curiae,

were signed by Honorable Willis W. Ritter on the 22nd day of January, 1965 and entered in the Docket as of the 22nd day of January, 1965.

Andrew John Brennan, Clerk, by Deana Scott, Deputy Clerk.

[fol. 597-704]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

C 143-57

UNITED STATES OF AMERICA, Plaintiff,

—v—

EL PASO NATURAL GAS COMPANY, Defendant.

Salt Lake City, Utah

Before: The Honorable Willis W. Ritter, Chief Judge.

Transcript of Proceedings—January 25, 1965

APPEARANCES:

For the Plaintiff:

LARRY L. WILLIAMS, Esq., JACK L. LIPSON, Esq., Antitrust Division, Department of Justice, Washington, D. C.

WILLIAM T. THURMAN, Esq., U. S. Attorney, 200 Courthouse & P. O. Bldg., Salt Lake City, Utah.

For defendant El Paso:

GREGORY A. HARRISON, Esq., ROBERT S. DAGGETT, Esq., ATHERTON PHLEGER, Esq., Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco, California.

[fol. 597-705]

LEON M. PAYNE, Esq., Andreus Keith, Campbell & Jones, 25th Floor Humble Bldg., Houston, Texas.

Applicants for Intervention:

State of Oregon: RICHARD W. SABIN, Esq., Asst. Attorney General, Public Service Bldg., Salem, Oregon.

Washington Utilities & Transportation Commission: ROBERT E. SIMPSON, Esq., Temple of Justice, Olympia, Washington.

Southern California Gas Company, and Southern Counties Gas Company of California: ROGER J. NICHOLS, Esq., 810 South Flower St., Los Angeles, California.

Paradox Production: BRIGHAM E. ROBERTS, Esq., Judge Building, Salt Lake City, Utah.

Also Present: PAUL B. CANNON, Esq., 920 Continental Bank Bldg., Salt Lake City, Utah, Representing Pacific Western Pipeline Corp.

Amicus Curiae: WILLIAM I. HARKAWAY, Federal Power Commission, Washington, D. C.

[fol. 597-705a]

COLLOQUY BETWEEN COURT AND COUNSEL

On January 5, 1965, the day set for further hearing in the above-entitled matter, the court announced, through the clerk, that the matter would be postponed until January 6, 1965 at 10:00 a.m. Then, at the request of counsel, the matter was further postponed until 2:00 p.m. of the same day. At 2:30 p.m. court convened and the following proceedings were had:

"Mr. Harrison: May it please the Court, the United States and the defendant have been, with the indulgence of the court, engaged in prolonged discussions in an effort to arrive at a possible understanding concerning a decree appropriate to this case; and, while we have made progress, we have not completed our discussions, and it is the request of the parties that we be afforded an opportunity to discuss it with the authorities in Washington. And for that purpose and to that end we ask that this matter be continued until a week from Monday.

"The Court: The matter is continued until a week from Monday at 10 o'clock, the 18th of January. We will be in recess."

On January 15, 1965 during rule day, the court said to Mr. Thurman:

"On the El Paso Natural Gas case, the matter you came in to see me about yesterday afternoon, I wish you would [fol. 597-705b] phone those people in the Department of Justice and tell them I want them to get me a stipulation and order for the postponement of that matter from next Monday to the following Monday, pursuant to what you told me yesterday. Let's get a stipulation and order on it."

[fol. 597-706] January 25, 1965

The Court: All right, you may proceed.

Mr. Harrison: If your Honor please, this matter coming on this morning in pursuance of continuance requested by the Department of Justice and acquiesced in by the defendant, I would like to suggest to the court a procedure which I think will assist the court and the parties in meeting the ends of justice in this case. I believe it is true that both parties have submitted all of the evidence which they propose to submit.

In connection with the plan for the creation of the New Company to acquire certain assets in El Paso and undertake to serve the Northwest market in pursuance of the certificate of the Federal Power Commission.

All of the evidence being before the court, on questions raised by the defendant as to the adequacy and propriety of that plan being before the court, I would suggest that those issues be submitted.

I would like to point out to the court that we have now been eight months in the process of developing and presenting to the court and to the Government this proposal for the creation of a new company, leading up to the decree of divestiture which this court is about to make.

I think that the court, and the record will show—and I think the court apprehends—that we have proceeded [fol. 597-707] diligently in behalf of the company in that respect.

We believe that the evidence shows that the company has made very large property and other concessions in the interest of the New Company, believing and hoping that a plan would be developed that would meet the acceptance of the Government and a stipulated judgment.

We believe that the record will show, and the court apprehends, that we had reason to hope for that result, and during that period of time we canvassed numerous, many creditors, debenture holders, security holders, and others, with the purpose of securing their acquiescence in this plan, and informally they have succeeded in accomplishing that purpose.

But in the meantime, eight months have gone by and New Company has not been formed. It is not in a position to acquire the assets and it is not in a position to firm up the informal commitments of the creditors of El Paso for the release of liens necessary to consummate this transaction. It is not in a position to apply for the necessary commissions and certificates from the Federal Power Commission, and otherwise, and we apprehend that this matter can now be put upon the road, New Company established, the stock of the New Company, when formed, to be issued to the trustee to be named by this court, the company put in a position to proceed with all of the details of the [fol. 597-708] creation of the New Company, its qualification to do business, and the issuance of stock which is disposable.

At the present time we have nothing to dispose of, the original stock, the original market; there is no buyer, there is no seller, and there can be none until New Company is formed and the stock issued.

We suggest to the court that the pleadings before administrative tribunals, being what they are, the problems of again canvassing all of the creditors, of going through the mechanics of obtaining the release of liens, the mechanics of re-issuing new bond issues for El Paso and the New Company, and all of the other details, including the proceedings before the Federal Power Commission, means that there will be no stock to dispose of, to distribute, to sell,

either on the market or to any buyer, for perhaps a year, perhaps a year and a half, perhaps two years.

No one can know now what the value of that stock a year, a year and a half, or two years from now, will be. No one can know now what the market will be. No one can know who the buyers may be at that time, if there are to be buyers. No one can know at this time exactly what position El Paso will be in with respect to proposed distribution to shareholders until the stock is issued, until it has property, until the company is in business, until there is a market.

[fol. 597-709] We suggest, therefore, that this court adopt a form of decree, which I think is quite customary. It is the form of decree in the Brown Shoe case used by the Supreme Court. It is the form of decree used in the Aluminum case. It is the form of decree used in the first America case. And that is that this court proceed to order divestiture within three years, as proposed in the plan—and I have heard no objection to that—complete divestiture within three years, but that the manner in which it shall be divested, whether in whole or in part to shareholders whether by public sale, or whether to private buyers, be deferred pending further consideration by this court in light of the circumstances as they will develop in the future.

In the meantime the court's function, at least of ordering divestiture, will have been accomplished; the trustee will have been appointed to take title to whatever stock is issued by the New Company, and we can proceed and get this show on the road.

Accordingly, we suggest to the court that the testimony concerning all of the issues relating to the formation of New Company, the properties to be transferred, the contracts to be made, be submitted to this court, and the court render its decree, order divestiture absolutely within three years, that it direct the issuance of the stock when issued and wherever issued to the court's trustee, and that the [fol. 597-710] parties may then have ample time and the court ample time, in light of better information, to know what the method, the time, and the manner of ultimate divestiture of the stock shall be.

I might say that we have no further testimony, except brief testimony relating to the issue of distribution to shareholders, which will only take ten or fifteen minutes.

The Court: There is a deep silence from the Government.

Mr. Lipson: Your Honor, the Government is prepared to respond to Mr. Harrison's suggestion at this time. I thought perhaps he would like to put his witness on first. I defer to his desires.

The Court: Well, the first thing we ought to do is close the evidence. Have you folks any further evidence?

Mr. Harrison: Yes.

The Court: Have you any further evidence?

Mr. Lipson: Yes, your Honor.

The Court: All right, let's have the evidence.

Mr. Harrison: I might say, Mr. Lipson, that there were certain contracts which you asked for and which we gave you—a box full, I think—and we promised to supply some missing ones that were not available then. They are now available and we will be glad to provide them for you.

Mr. Lipson: I would be happy if they could be made [fol. 597-711] available to us.

Howard Boyd called as a witness by the defendants, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Harrison:

Q. Mr. Boyd, I call your attention to Exhibit H in this case which, among other things, referred to some 1625 stockholders of record holding 1,001 shares and over, and I would like to ask if subsequent to the admission of that exhibit further investigation has been made with reference to the stock ownership represented by those 1625 shareholders of record?

A. Yes. You will recall that Mr. Lipson asked us to furnish him with the breakdown of stockholders zero to 99, 101 to 200, and so on, and all holding 1,001 shares and above. We were able to get some immediate answer to that inquiry by contacting the transfer agent, and the information was included in Defendant's Exhibit H. And that did show that there were listed stockholders numbering 1625 holding 1,001 shares and more, and the aggregate number of shares so held amounted to 10,399,775.

We, of course, knew that many of those stockholders that were listed on the transfer agent's records were nomi- [fol. 597-712] nees, brokerage houses, and the like. And so taking the list of brokerage houses that the Department of Justice had contacted to ascertain what blocks of 5,000 shares and more were held by beneficial owners doing business with those brokerage houses, we then wrote to the brokerage houses simply asking them how many accounts were represented in their listed holding of El Paso stock. We got written responses—and the originals of these letters are available here in the courtroom—we got written responses from 151 such persons that we communicated with. And when you analyze that information—and it is analyzed on papers that you have there in your hand—

Q. That is this document, "El Paso Natural Gas Company—Supplement to Defendant's Exhibit H" showing partial list of beneficial owners of stock held of record by brokers and nominees?

A. That is correct. When you analyze that you observe that this 10,399,000—

Mr. Lipson: Objection, your Honor. The witness is now testifying from pure hearsay, and I will object to any further testimony along that line.

Mr. Harrison: I don't know the basis of calling it hearsay, your Honor. May I ask counsel to—

The Court: Surely.

Mr. Lipson: The witness has testified that he did not [fol. 597-713] derive the underlying information. The underlying information was derived by a multitude of third parties who are not present in this court. We don't know

who made any investigation, the extent of the investigation involved. This is absolute hearsay, your Honor. It is unquestionably hearsay. Mr. Boyd did not make this investigation. He is testifying from it. I believe that it is completely incompetent.

Mr. Harrison: This is entirely supplementary to the same type of information which the Government secured and which is now in evidence, if your Honor please, from the same sources and in the same manner. It is a well established rule of evidence that while hearsay is improper ordinarily, that when one is confronted with the necessity of canvassing the information from a large number of people, the number being such that it is totally impractical to go and consult each one of them, this sort of information is satisfactory and is an exception to the hearsay rule, and I submit the objection.

The Court: Overruled.

Mr. Lipson: Your Honor, may I respond in part to what Mr. Harrison said?

The Court: Yes.

Mr. Lipson: The exhibit to which Mr. Harrison referred is Defendant's Exhibit K—this is not a government exhibit. [fol. 597-714] We objected to the admission of that exhibit at the time, and we renew our objection to this exhibit, Defendant's K. It is equally inadmissible. However, defendant brought it in over our objection. The Government is not bound by the entry of that document in evidence, your Honor.

The second point is that while Mr. Harrison has a point with respect to obtaining information from a large number of sources, there is considerable detailed body of law as to the methods and procedures by which a survey of this kind can be conducted. In other words, insure the veracity and the accuracy and the unquestioned integrity of that survey, including the statistical matters associate with it. There is no indication from either Mr. Boyd's testimony or from the nature of the letter sent out that this was a survey that meets the normal requirements of that particular exception to the hearsay rule. This is a unilateral—

The Court: Give me the case. We have had enough jawbone in this matter. Just give me a case on that evidence point.

Mr. Harrison: I will be glad to obtain a case for you, your Honor. I don't have one at hand.

The Court: Well, we have met it here before. You have raised the question. You say there is a considerable body [fol. 597-715] of law. Just give me one case.

Mr. Lipson: May I suggest—

The Court: One reference to Wigmore.

Mr. Lipson: May I note, your Honor, that the burden of establishing the accuracy—the burden of establishing the exception to the hearsay rule should be on the defendant, not on the Government. This is clearly hearsay.

The Court: You are the one who suggests there is a considerable body of law. It is my impression that where the sources are of this character, numerous individuals—

Mr. Lipson: I will refer your Honor to an article in the Cornell Law Quarterly I am familiar with. I don't have the citation immediately available.

The Court: That doesn't help me very much.

Mr. Lipson: There are other cases as well. There is a recent ruling by the late Judge Dawson in the United States v. Kennecott Corporation where he excluded documents of this nature.

The Court: That doesn't help me very much. What is the reference. Let's see it.

Mr. Lipson: The National Homes case is another case, your Honor, that goes into considerable detail as to the requirements for a survey, U. S. v. National Homes. Again, the citation can be supplied to your Honor.

Mr. Harrison: May I point out to the court that the [fol. 597-716] survey here is a very simple one. It consisted of asking one question from each of some—

By Mr. Harrison:

Q. How many?

A. One hundred fifty-one.

Q. One hundred fifty sources.

Mr. Harrison: And the original letters, both inquiring of the information in uniform form and the answers in their original form are here, copies have been delivered to counsel, the originals are open for his inspection.

The Court: What was the question?

Mr. Harrison: I'm sorry.

The Court: What question was asked? You said there was one question.

Mr. Harrison: Your Honor, we simply asked them how many accounts were represented by their listed holding of El Paso Natural Gas stock, and it was a one-page inquiry. Here is a copy of it, your Honor. And they made their response at the bottom, and signed it.

Now, may I point out to the court that counsel would ask us here, in the interest of suppressing this information, that we visit 150 places of business scattered around the country to examine nearly 19,000 entries personally, and perhaps the certificates underlying them, I don't know. This simply means that this character of information is not obtainable. This being the only practical way it can [fol. 597-717] be obtained, it is an exception to the hearsay rule.

Mr. Lipson: Your Honor, there is one additional case I would like to bring to your attention.

The Court: Let's look at the thing that has been done here first. Here is a letter. The one I am looking at is to Abbott, Proctor and Paine, 2 Broadway, New York City, signed by John M. Evans, associate general counsel, El Paso Natural Gas Company. It simply asks one thing.

In the first place, it says that the government, the Department of Justice, requested "you to furnish 'a list of persons who beneficially owned 5,000 or more shares of El Paso Natural Gas Company common stock held in the name of your company as of April 24, 1964.'"

That was supplied and received here.

Now, the company asks one question. "On behalf of the defendant, El Paso Natural Gas Company, we wish to also

introduce evidence regarding the number of beneficial owners represented by the shares held in the name of firms previously contacted by the Department of Justice. We are not interested in the names and addresses of your customers who are the beneficial owners but only in the number of accounts for whose benefit shares of El Paso Natural Gas Company Common Stock were registered in the name of your firm on the date indicated.

[fol. 597-718] "... it will be appreciated if you will endorse on the foot of a copy of this letter, enclosed for that purpose, the number of beneficial owners for whom you held shares of El Paso Natural Gas Company Common Stock registered in the name of your firm on April 24, 1964 and return the information to us ..."

Now, this letter is addressed to reputable firms, brokerage concerns. None of them have the slightest interest in falsifying the information. The guarantees of authenticity are great. Their records are public. The SEC could investigate any misrepresentations. And a guarantee of authenticity is all you need.

The hearsay rule was developed to prevent an imposition upon a jury trying a lawsuit. Jurors might be misled, unduly influenced, by hearsay information, rumor, old wives' tales. But in nine or ten instances there were exceptions to the hearsay rule, and every exception is based upon the proposition that there are guarantees of authenticity which enable us to rely upon that testimony, even before a jury, without any expectation that the jury will be misled.

One of those exceptions is a dying declaration. A man is on his death bed and is about to expire. He tells us who shot him.

Another exception, an exception now which is a matter of federal statute, is business entries. This, it seems to [fol. 597-719] me, comes mighty close to covering this case.

It used to be the shop book rule, old English shop. But now we have gotten way beyond the small shop book rule. Today in big business, if entries are made in the ordinary and usual course of business, they come in under the federal statutes.

Now here are entries certainly in those brokerage houses' books of accounts, entries indicating who are the beneficial owners of the street shares that the broker holds for those accounts.

Now, here all the time, and not only here, but in the federal trial courts generally, and I think completely generally, we do not require that those brokers come in here with their entries from their books and records to identify them. We receive this sort of thing all the time on the basis of representations of counsel that they were obtained in the way that these have been obtained. There is a request, there is a response, and the brokerage outfit, which is a reputable concern—I don't know anything about Abbott, Proctor and Paine at 2 Broadway, New York, but I imagine that is a considerable concern, having that address. It is unthinkable that that concern, or anybody connected with it would be interested in falsifying their records, records that are open to inspection by the SEC, open to inspection by the parties to this lawsuit really on subpoena. There is no privilege that protects those records. [fol. 597-720] It is unthinkable that they should be falsified by anyone or that anyone would have a desire to falsify them, or the El Paso Natural Gas Company people here, who, it seems to me, have acted most honorably in this matter and have attempted, it seems to me, to prevent fully, extensively, in depth, anything that the Government has asked for, anything that the Court has asked for.

Maybe once, when business was small, and maybe now when business is small, carrying on on a crossroad corner, maybe you get people who would attempt to falsify records. But when business gets as big as this business is and gets as big as those brokers' business is, if they wanted to, they couldn't get away with it. Practicality controls morals sometimes and ethics. Why, it is unthinkable that El Paso would try to finagle this evidence. There is all kinds of evidence before this Court of the honorable character of the management of this concern and of their counsel, and

it is unthinkable that those brokerage houses would misrepresent their accounts to please anybody.

Now, it seems to me that the guarantees of authenticity in this matter are beyond question, just simply beyond question.

Now, let's look at the other side of the coin. Suppose I sustained that objection of yours. In order to find out how many individuals owned a share or shares of stock of the [fol. 597-721] El Paso Natural Gas Company, what would we be required to do? Just what would be required?

There are 151 of these brokerage houses—or is it accounts?

The Witness: 151 brokerage houses, your Honor.

The Court: 151 brokerage houses. And if you are going to be this stubborn about it, we would have to require that 151 people, who have the custody and control of that record, come in here, subpoena them from all over the country, come in here and testify to this information. Now, that is the alternative. I think it is ridiculous that in a modern court, dealing with modern problems, with honorable men, with the guarantees of authenticity that it seems to me are present here, for a court to sit here, in all of its pontifical majesty, and say, "I sustain your objection to that."

I just don't think you can produce any authority that requires me to do that, and it seems to me the purpose of Congress in enacting our business entry rule of evidence covers the situation.

Mr. Lipson: May I respond, your Honor?

The Court: Mr. Henderson, get me that statute.

Surely.

Mr. Lipson: The vice of this method of proceeding, your Honor, is not that there is a question about the integrity [fol. 597-722] of the El Paso witnesses. It is just that they cannot be cross-examined on the underlying material because they have no knowledge whatever of the underlying material. Therefore the Government is deprived totally and completely of its right to cross-examine in order to determine what this underlying material indicates.

May I draw your attention, your Honor, to the letter from Bruns Nordeman and Company. We can't even determine from the copy we have who signed that letter. It is absolutely illegible. Every one of these responses were made not under oath, your Honor. There wasn't even an attempt to secure these by affidavit.

The Court: You don't have to have them under oath under the statute I am talking about nor under the business entry rule.

Mr. Lipson: I understand that, your Honor, but these are entries made for the purposes of litigation. These are not normal entries made in the business records. These are for litigation. Litigation was behind every letter that was written by El Paso.

The Court: Mr. Lipson, of course these letters were prepared for the purposes of this litigation, but the information in them is an entry made in the ordinary and usual course of business of those brokerage houses. Do you not agree?

[fol. 597-723] Mr. Lipson: I don't know, your Honor, and that is again the vice of it.

The Court: Well, now, look at what they ask for. It doesn't satisfy me to say you don't know. Look at what they ask for. They ask for the number of beneficial owners represented by the shares held in the name of the firm previously contacted by the Department of Justice. That is what they are asking for. They are talking about: "It is most important that we be prepared to present at that time—" that is January 5 "—evidence as to the total number of accounts represented by the shares registered in street names."

Now, the total number of accounts in each brokerage house is a business entry made in the ordinary and usual course of those businesses. Is that right?

Mr. Lipson: Not as they appear on these documents, your Honor. Again, these documents are the only ones we have access to.

The Court: Of course this document is not that business entry. Nobody is suggesting that. But if I sustain your objection to these documents, then we are going to have to bring somebody in who has the custody and control of those books and records of each of the 151 brokerage houses here, and we put him on the stand, and we will say to him, "Do you have custody and control of those records?"

"Yes, I do."

[fol. 597-724] And then you say to him, you say to him, "Is this a correct and accurate statement of the book and record?"

And he says, "Yes, it is."

And you say, "Do you have the books and records of account with you here in the courtroom so we can examine them?"

"Yes, I have."

And on that basis we admit them, don't we?

Mr. Lipson: Your Honor, there is—

The Court: Regularly we admit them, and you have no more cross-examination of him than you have in this case.

Now, counsel suggests that if you want to, if you want to check up on these things, why, of course, you will have plenty of opportunity. We will recess this and let you check up on them if there is something faulty. You suggest there is a signature here you can't read. We will get a witness to straighten those things out. But to require an employee from 151 brokerage houses to come here and simply answer questions—the only questions you can ask him—you ask him his name, you ask him where he lives, you ask him for whom he works, you ask him if he is the custodian of the books or records in question and he says he is, and then you ask him if those entries were made in the ordinary and usual course of business and kept as such, and he will say, "Of course." And then you will say, "Well, now, you are just handing us a copy of that. You are [fol. 597-725] handing us a summary of it. You are handing us a statement, like this letter. Now, will you tell us whether or not those books of original entry are in the courtroom."

And Mr. Harrison will have them here, and he will say, "Yes." That is it.

Mr. Lipson: Your Honor, that is not the only alternative available to produce this information. I am aware of the burden that could be imposed on the Court by the method you describe. But there are accepted methods by which an independent statistician, an individual, or accounting firm, who is not associated with either of the litigants in this proceeding, can make this investigation.

The Court: Suppose they had done that. Suppose they had hired Haskins and Sells, or some other nationally known accounting house, to go and do this very same thing, and you have the fellow on the stand, and he says, "As of April 24, 1964 Abbott, Proctor and Paine have 19,284 shares of El Paso in the name of its firm for 100 beneficial owners."

Now, there I think you have a real exception.

Mr. Lipson: That is not what we are presented with now, though, your Honor. We don't know where these figures came from, what underlying veracity they have, and we are deprived of any effort to find out.

The Court: The thing shows on its face. Abbott, Proctor [fol. 597-726] and Paine reply. Granted this is a copy one of these modern copying machines runs off and the signature, you know—sometimes they don't pick up the ink color very well, and they didn't pick up the ink color very well on the one I am looking at, but that sort of thing can be corrected. If we are going to have to resort to this sort of business—I don't think your alternative, Mr. Lipson, is as good as what we have here. We don't have some third party going in there and going through the files and stating something. You have the company itself on the line making this representation. You have Abbott, Proctor and Paine making this representation.

Now, there is just no use in the world for us to go through all of the trouble we have already gone through and all of the trouble we are still going to have to go

through to endeavor to make a proper divestiture here, a divestiture that will satisfy the Justices of the Supreme Court of the United States. No sense of our doing that at all if we are going to have a lot of little evidence questions around. I would hope that we would have a clean record, freed of this sort of business.

Now, on the other hand, I don't think that the Government should question the authenticity of a document of this kind, and, so far as your cross-examination is concerned, if it is done in the way that, of course, it would have to be done if I sustain that objection, you will have 151 people [fol. 597-727] here from every one of those brokerage houses, every one. Sure, sworn, sure, cross-examined, but cross-examined on what?

We admit that sort of thing on the examination I have just detailed to you.

What else could you ask him about? The underlying data, you say. What underlying data is there?

The brokerage house simply holds 100 shares of stock evidenced by a street certificate for my account. That is all there is to that.

Now, when they say they have that money, they have 19,284 shares held for 100 beneficial interests, what else would you cross-examine him on, Mr. Lipson, if you had him here?

Mr. Lipson: Your Honor, we have no indication—

The Court: Let's hear the cross-examination.

Mr. Lipson: We have no indication here, your Honor, that there have been any accepted statistical checks of this material. We have no indication here that we have any underlying data as to the identity of these beneficial owners, something that would be of inestimable value and quite material to these proceedings. All those are unanswered questions that do not appear on the face of these documents, your Honor.

Mr. Harrison: If counsel wishes the names of all these people, counsel could have asked for them when he asked

for the other information of the same people and he would [fol. 597-728] not have made this invalid objection to such an offer.

I do not understand that because I call myself a statistician that I can write a letter to a brokerage and get a response and have it admissible, and, if I am not a statistician, I can't. I don't know what it is that glorifies the name of a statistician so that his letters invoke a truth and other letters invoke an untruth. The same thing goes for an accountant. This falls squarely within the rule, if your Honor please, that we simply cannot check—and by the way, we only had a few days to do it—all of the entries that are involved in these reports and in the summary.

Counsel doesn't want this information in the record for some reason. Why, I don't know.

The Court: Well, the Court wants it in. One of the most important considerations, I think, in this matter is to find out how that stock is held.

Mr. Harrison: If counsel doesn't believe these letters and wishes to canvass these people and look at their records, he is perfectly free to do it, and we are perfectly glad to have him produce any corrections or errors that he can possibly find, and I am willing to enter a wager he will find absolutely none.

Mr. Lipson: Your Honor—

The Court: Now, this Section 1732, Title 28, is the statute I had reference to. "Records made in the regular [fol. 597-729] course of business." You might look at that.

Now, I want to read that statute to you. And this is what the Congress thinks about this sort of business.

"In any Court of the United States and in any Court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business; and if it was the regular

course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or records, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

Now, just precisely what would you examine someone upon if I sustain this objection, and 151 business enterprises across this nation have to send somebody down here with the records? Just precisely what would you ask him, in view of that statute?

Mr. Lipson: Your Honor, the initial inquiry would be broader than the inquiry that El Paso makes here. That is the commencement of our inquiry here. Certainly we [fol. 597-730] would be interested in determining the extent to which, and the date for which, these figures are valid. We have no knowledge of that either, your Honor. This whole thing is—

The Court: I don't know what you are talking about. I just don't know what you are talking about.

Mr. Lipson: We don't even know who Abbott, Proctor and Paine are, your Honor. Quite frankly, we don't know them. We don't know who they represent. We don't know who Atwell and Company are, your Honor, or none of these other brokerage houses.

Many of them are not well known firms.

Mr. Harrison: May I interrupt at this point to correct counsel on one statement he made. He said the exhibit which is in evidence, which consists of just this sort of information produced in this matter was put in over his objection.

May I read the record, your Honor?

The Court: Yes.

Mr. Harrison: "Mr. Harrison: We requested counsel for certain additional information—Exhibit D for the defendants set for the stock of—registration of shares of stock of the names of various brokers and nominees; and

counsel has been kind enough to give me the information we requested on that. And we'll offer it in evidence as Exhibit K.

"Mr. Lipson: May I object to that submission in [fol. 597-731] evidence? Those are my personal notes, counsel's notes, of the material obtained. I'm glad to make the material available, but I'd like to have it in some other form than counsel's notes.

The Court: I'm going to receive it in evidence, and you can substitute a form that you're speaking about. Show it to counsel first. We'll receive this now."

In other words, this character of information, so far as what it reveals, seems to be comforting to counsel, is acceptable and admissible. Supplementary information, however, that he doesn't choose to readily digest is objectionable.

I submit the admission of the first document entitles us, in any case, to the supplemental information.

Mr. Lipson: Your Honor, the document referred to by counsel, Defendants' Exhibit K, was admitted over Government's objections. They are my personal notes. I did make them available to counsel for information. I never at that time, nor did any Government counsel, concede their admissibility as evidence in this cause.

Mr. Harrison: But there was no objection.

Mr. Lipson: There is certainly no basis whatever for admitting these, what I assume are now admitted hearsay documents, into evidence through Mr. Boyd, who had no responsibility for conducting a very extensive investigation [fol. 597-732] that is involved here.

The Court: What do you want us to do? What do you want us to do, Mr. Lipson? Let's get this straightened out.

Mr. Lipson: Just sustain the objection, your Honor.

The Court: Yes, and then how are we going to prove this? What do you want us to do by way of proof?

Mr. Lipson: There are accepted procedures that counsel may follow.

The Court: All right, tell me. Do you know what is the most accepted procedure? It is the one I just read you.

Mr. Lipson: I understand that, your Honor.

The Court: That is the accepted procedure. That is the way it will be done if that objection is sustained. We will have 151 individuals in here with a record, or with a copy of a record, with the records present in Court, and all those brokerage houses, doing business with those records every day, every hour, will have to have their records here to substantiate the copy. Every one of them.

Mr. Lipson: The Government is not opposed to a survey in this field, your Honor. It is just that we think a unilateral survey of this nature, without any guarantees of veracity, does not fall within the exception to the hearsay rule.

The Court: When you say "without any guarantees of veracity," that, of course, is not so. That, of course, is [fol. 597-733] just not so.

Mr. Lipson: The way to conduct a survey of this nature, your Honor, would be bilateral, with both parties permitted to put the question to these various brokerage houses.

The Court: In other words, take 151 depositions.

Mr. Lipson: No, your Honor. They could be in the form of—

Mr. Harrison: Counsel is perfectly free to elicit any supplemental information he wants, but he just doesn't want this to get before the Court for some reason. I don't know why. He can go out and get all the information he wants. We don't care.

Mr. Lipson: In its present form it is objectionable.

The Court: Well, that is the question we are talking about, whether it is or whether it isn't. The Court is inclined to think it isn't objectionable. Of course, if you want to be that technical about it, we will postpone this matter—you fellows have had two weeks. I don't know what you have been doing down there in Washington for two weeks. The first thing I hear when you come up here this morning is that you don't want to get in business entries that are made in the ordinary and regular course of business.

Now, if you want it further postponed so we can get this evidence in in a way that will satisfy the Department of [fol. 597-734] Justice, we will postpone it, and I will send word down to the Supreme Court about it, that we are doing the best we can with the help we are getting.

Mr. Lipson: We have no desire to postpone these proceedings, your Honor.

Mr. Harrison: Just want to keep the evidence out.

The Court: How are we going to get the stuff done if we don't proceed?

Mr. Lipson: Your Honor, we were not consulted at all on the nature of this survey. It was intended originally as a survey to produce evidence that would be presented before your Honor. At that time the proper thing to do would have been to consult counsel to find out whether they had any objection to the method by which the survey was being conducted. No consultation of such sort was ever made.

Mr. Harrison: I know of no obligation on my part, may it please this Court, to request permission of counsel to gather and produce evidence. I know of no such rule that the Department of Justice requires opposing counsel to ask him how he is going to collect the information he is going to present to this Court. If you will tell me the citation, I would sure like to read it.

Mr. Lipson: This is not evidence—

The Court: Let's not get into any further hassle than we are in. I would suggest to you there isn't any rule [fol. 597-735] of law that requires you to talk to counsel about anything. You just take care of your own cases, each one of you. When you bring them here, we will see what you have, and we will sift it out here. It just seems to me that if I sustain this objection, there is only one thing you can do, Mr. Harrison, in my view of it, and that is to get 151 clerks from 151 brokerage houses all over this nation, reputable firms, large firms, well recognized and respected, whose signature isn't any good on this answer, according to the Government, but who will send a clerk out here who is the custodian of that particular record and

who will say it is kept in the ordinary and regular course of business, to satisfy 1772.

Now, as soon as that is done, every other question the Government could possibly have about it goes to its weight, not to its admissibility. Of course, if you are going to be technical about it, they will have to bring the original records. If they bring that original record out here and put it in court, you will have 151 active brokerage houses with that record out of their place of business, out here in court. And they are using those records every day, every hour, in carrying on their business.

Now, this sounds like we are getting back to the Medieval times. Certainly we have more enlightened views about admissibility of evidence than that.

There is just no use, however, getting hung up on an [fol. 597-736] evidence question. It is too important to get this case settled, disposed of, finished, the companies divested so they can go out and carry on their business, instead of spending all their time in a courtroom someplace.

But that, Mr. Harrison, is for you to decide. If you want to stand on your offer, I would like to hear it. Why don't you tell me about that at 2:00 this afternoon?

Mr. Harrison: Very well, your Honor.

The Court: And why don't you bring me some authority that says this sort of thing is not admissible, on the basis that you want to cross-examine somebody, because the very best alternative to this—you can't cross-examine them on anything except: Is this the record kept in the ordinary and usual course of business?

Mr. Harrison: I might point out to your Honor that this evidence goes exclusively to the question of the manner in which the stock shall be divested; and, if the suggestion concerning procedure made to the Court this morning were to be followed, we would have ample time for the Government to examine all the records in New York and everywhere else, and there would be no need of any haste about the matter.

Mr. Lipson: Are you through, Mr. Harrison?

Mr. Harrison: Temporarily.

The Court: All right. We will straighten the record up so we know where we are. The Court withdraws his [fol. 597-737] ruling. I made the ruling before Mr. Lipson had an opportunity to speak to it, so at this juncture there is no ruling on that offer—or on the objection—and we will see what we do about it later.

Mr. Lipson: May it please the Court, I would like to address myself now to the suggestion made by Mr. Harrison with respect—

The Court: I want you to close your evidence. I told you a bit ago I want both of you to get your evidence closed.

Mr. Lipson: Yes, your Honor.

The Court: Do you have any further evidence?

Mr. Lipson: Yes, your Honor.

The Court: You said you had. Let's hear it.

Mr. Lipson: I would like to call Mr. Peter King to the stand, your Honor.

[fol. 597-738] Peter King, Jr. called as a witness on behalf of the plaintiff being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lipson:

Q. You are Peter King, Jr.?

A. Yes, sir.

Q. Would you give your address, please.

A. 1612 East Yampa, Colorado Springs, Colorado.

Q. Have you been subpoenaed to appear in this action?

A. Yes, I have.

Q. What position do you hold, Mr. King?

A. I am senior vice president of the Colorado Interstate Gas Company.

Q. How long have you held that position?

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A. Since February, 1954.

Q. And prior to that time what position did you hold?

A. I was elected vice president of the company in February, 1959. I originally joined the company in May, 1953 as administrative assistant to the then executive vice president and now the president of the company.

Q. Would you describe generally the nature of your duties for Colorado Interstate Gas.

A. My duties are principally of a financial and legal nature.

[fol. 597-739] Q. Would you describe—

A. Excuse me.

Q. I am sorry.

A. During my entire period of employment with Colorado Interstate my duties have been in these fields, principally in the financial fields and secondarily in the legal and regulatory fields. The accounting departments of Colorado Interstate and its wholly-owned subsidiaries report to me, as do the financial control departments, the treasury, and the legal departments.

Q. Are you the chief financial officer of the company?

A. Yes, I am.

Q. Have you had any experience with respect to underwriting issues for the company?

A. Yes, I have.

Q. Would you state what that experience consists of?

A. I have participated in all of the financing that Colorado Interstate Gas Company has done, since I joined it in May of 1953. During that period I have participated in the financing of approximately 125 million dollars of debt securities. This also included the exchange of bonds for notes held by insurance companies at the time the Colorado Interstate first offered a debt security publicly. I participated in the financing of preferred stock issues, of secondary offerings of common stock, of exchange offers of [fol. 597-740] common stock, of negotiations for short-term loans, and generally in all the financial affairs of the corporation for more than the past ten years.

Q. For the record, in what business is Colorado Interstate Gas engaged?

A. Colorado Interstate Gas Company is primarily a natural gas transmission company. It also owns, through a wholly-owned subsidiary, interests in oil and gas development activities, refining and marketing, and manufacturing activities.

Q. Will you describe the territory served by Colorado Interstate.

A. We serve generally the territory on the eastern slope of the Rocky Mountains, extending from Cheyenne, Wyoming to Amarillo, Texas. Our system extends from the Panhandle of Texas, Oklahoma, and Kansas in a northwesterly direction to Denver, Colorado. It also extends from a connection with the Northwest Division of El Paso itself in western Wyoming easterly and southerly to Denver. Denver is the load center of our transmission system. Colorado Interstate is one of the oldest natural gas transmission companies, having been organized—

Mr. Harrison: I don't know that—I object to the materiality of this evidence on the history of Colorado Interstate Natural Gas Company. I don't know what it has to [fol. 597-741] do with this case. It is an estimable company, I am sure.

Mr. Lipson: It is by way of foundation. It will be connected up, your Honor.

The Court: Well, I sustain the objection. Let's get to what you have in mind.

By Mr. Lipson:

Q. What is the size of the net utility plant of Colorado Interstate?

A. It would be in the order of 125 million dollars.

Q. Mr. King, have you approached the officers of the El Paso Natural Gas Company to discuss with them, that is, the president of El Paso and the chairman of El Paso, any negotiations leading to Colorado Interstate Gas's ac-

quisition of the properties to be divested in these proceedings?

A. Yes, we have.

Q. Would you describe the nature of those contacts?

Mr. Harrison: I have to object to the relevancy unless I find out what this has to do with some issue in this case, your Honor.

The Court: Sustained.

Mr. Lipson: Your Honor, you stated at the December hearings that, as a matter of order of proof, you preferred to defer any discussion of the alternatives to a later date. We are now presenting Mr. King as a witness who will testify on at least one alternative to the El Paso plan.

[fol. 597-742] Mr. Harrison: If you mean to offer testimony that this witness would be happy to try to buy assets from El Paso, I will stipulate he will be happy to do so. Is there anything else involved?

Mr. Lipson: There is a good deal else involved, your Honor. We are talking about not buying assets merely, but about operating a pipeline company, and I think Mr. King is prepared to testify to that in the normal course.

Mr. Harrison: If he wishes to prove Mr. King's company can operate a pipeline, I will stipulate to that.

The Court: They have been doing it.

Mr. Harrison: Yes, your Honor.

Mr. Lipson: If I may state it, your Honor, I wish to prove, not that Mr. King's company can operate the Colorado Interstate pipeline, which serves Denver and other areas, but that his company is able, willing, financially able, and able in a sense of competency to manage the Pacific Northwest Pipeline and able and willing to secure the necessary financial and other backings for it and able and willing eventually to bring an extension of that pipeline to serve the California market.

Mr. Harrison: If your Honor please, I still say that if counsel is trying to prove that there are concerns of people willing and able to purchase the new company to be created as a result of these proceedings, that is true. It is going [fol. 597-743] to be a very good company. It is going to be

very desirable after it has been put in business and established. But I don't know what it is going to be worth, and neither does this witness, and he can't buy it now, because it doesn't exist. He couldn't make an offer and he couldn't be accepted. And he wouldn't know what he was buying.

If all you want to prove is that this company can be sold, that the stock of it can be sold, I will stipulate to that.

The Court: It sounds to me, Mr. Lipson, as though you are about to go into the kind of inquiries that the Federal Power Commission would be interested in going into. If you confine yourself to the proposition that there are people, and this is one of them, who would like an opportunity to buy the assets that are going to be divested from the El Paso Company and assume the liabilities along with it, I think there are such people, and their representatives are sitting around the courtroom. I am looking at two of them. I don't think either one of them is this man's outfit. So it looks to me as though there are about three of them. There may be more.

Now, if you confine it to whether they would like to buy it, they have experience in operating a gas pipeline, they are able and willing, I can understand it, and I guess we [fol. 597-744] could get a stipulation on that. But if you are going to go into the details that normally would be presented to the Federal Power Commission, and of necessity presented to the Federal Power Commission, for certification, why, I think that is not relevant here.

Mr. Lipson: It was not my intention, your Honor, to go into the matters that would normally be considered in a Power Commission certification proceeding.

The Court: Well, it sounded like it to me. It sounded like it to me. Go ahead.

By Mr. Lipson:

Q. Mr. King, would you describe the contacts you have had with Mr. Kayser and Mr. Boyd with reference to the purchase of the company to be divested.

A. Yes, sir. The Supreme Court order in this matter—

The Court: Well, never mind about the Supreme Court order now. We know about that.

The Witness: The same week—

The Court: I don't understand what difference it makes what conversations they have had.

Mr. Harrison: Well, I was going to object to it, your Honor, but I didn't know what he was driving at. This gentleman indicates an interest in behalf of this company to buy the New Company. There is no New Company to buy yet. He can't negotiate for the sale of it, because there isn't anything for sale. Mr. Kayser can't sell it. Neither [fol. 597-745] could Mr. Boyd. Neither could the board of directors.

Mr. Lipson: I would like to bring out that this is not an eleventh hour proposal by any means by the Colorado Interstate. This is a well-considered arrangement they have tried to discuss with El Paso on a businesslike basis, and they have been rebuffed in this attempt.

Mr. Harrison: They have been what?

Mr. Lipson: Rebuffed.

Mr. Harrison: I will stipulate they have been rebuffed.

The Court: All right. That is the conversation, they have been rebuffed.

Mr. Lipson: I would offer to prove that on several occasions Mr. King and Mr. Mueller, the president of Colorado Interstate Gas, spoke with both Mr. Boyd and with Mr. Kayser about acquiring the assets to be divested, but they first approached them in April of 1964 in New York in the El Paso offices.

The Court: What difference does it make how many times they have approached them. The net is that they have been rebuffed. Isn't that right?

Mr. Harrison: That is right, your Honor.

By Mr. Lipson:

Q. In these conversations with the El Paso officers, Mr. King, did you have occasion to ask for more detailed information?

[fol. 597-746] Mr. Harrison: I submit that is incompetent, irrelevant, and immaterial what he had occasion for. If he is asking for a conversation, I object to it as irrelevant.

The Court: Sustained.

Mr. Lipson: I would offer to prove, your Honor, that in these conversations between Mr. King and Mr. Mueller on the one hand and Mr. Boyd and Mr. Kayser on the other Colorado Interstate Gas people originally asked for additional information so as to be able to make a firm dollar offer, that this information was denied them by the El Paso people; and I would also offer to prove that the Colorado Interstate Gas people were subsequently informed by El Paso that El Paso would prefer to go forward with its own plan of divestiture and would not be willing to sell the property or make it available to Colorado Interstate Gas.

Mr. Harrison: And I object to all of that upon the ground that this case is before this court in a proceeding for divestiture, and this is where the company belongs. This is where El Paso belongs, and this is where El Paso has to come to get its decree, and not Mr. Mueller or the witness.

The Court: And, furthermore, this court has the only authority to frame this decree in the first instance.

Mr. Lipson: We understand that, your Honor.

The Court: And this court has been directed to frame [fol. 597-747] this decree. This court is going to frame the decree. I don't see of what significance it is that somebody has been trying to buy it, because they can't buy it. It is in litigation. And the Supreme Court has directed this court to frame a decree of divestiture, which this court proposes to do. And nobody, nobody, can frame that decree but this court.

Mr. Lipson: We understand that, your Honor. And to make our position clear, we do not, in any event, try to sponsor any attempt to circumvent the powers of this court. We are merely presenting to the court Mr. King's proposal as an alternative to the El Paso proposal that has been presented to this court.

The Court: I don't see how they could have any such proposal, more than to say that there is somebody willing and able and anxious and seeking to buy the assets and assume the responsibilities.

Now, I will tell you what: We could go on here for weeks listening to this. This makes at least three people in this sort of a situation sitting around, not parties to this lawsuit at all, waiting to see if there is going to be an opportunity to pick up a rich plum cheap.

Now, maybe before we get through I might be—I don't expect it to arrive—but you might speculate that sometime in these proceedings we may reach a point where the court [fol. 597-748] would have to say, "Well, the way to divest, after all, is to have somebody set up a new company, whether it is this outfit or whether it is Blythe and Company or whether it is—" what is the name of that other outfit that wants to buy around here?

Well, anyway, you might speculate about a time arising sometime in the future when the court decides that that is the way to divest, and at that time I can conceive that the court would want these competitors—and they are really competitors—to come in here and show their hands, and see which one is the best one to turn it over to, but it seems to me it would be very premature at this juncture to be going into that possibility. It seems to me that if the occasion arrives, if it ever does, that the court thinks that is the way to do it, then would be the time to have these competitors come in and, in strict conformity to the free enterprise system, let them compete, let them show their hands, let them show us what they have and what they can do.

We will have the Federal Power Commission in here as amicus to tell us about it.

But at this juncture all this can do, it seems to me is delay prematurely what the court has been ordered to do.

If the time should arrive when that sort of thing is a [fol. 597-749] desirable possibility, then the court can consider it.

Now, you told me before—I remember it well, Mr. Lipson—when you made your offer in December—you told me you felt it was your obligation to show an alternative plan.

Well, now, it doesn't seem to me that your obligation requires us to sit here and listen to three or four or more competitors to buy these assets spell out in detail matters including those things not before this court, because they are Federal Power Commission matters.

It seems to me that it should suffice for your purpose that you can produce these people who say, "Yes, we would like to do it, and we will tell you who we are, and you can investigate our capabilities."

At this juncture it seems to me this is an interruption. We are considering something else at the moment. El Paso has made a proposal, and I would like to consider that proposal. And that is what we have been doing.

Now, what do you say to that?

Mr. Lipson: We agree with your Honor. It is not our intention to go into an extensive, detailed analysis of what Colorado Interstate might or might not do with the pipeline, or what any other possible purchaser might. We merely want to establish that these people are responsible financially and responsible so far as their abilities to manage the new pipeline are concerned.

[fol. 597-750] The Court: Well, you see, that gets you into Federal Power Commission considerations.

Mr. Harrison: And, in any event, your Honor, we are willing to stipulate to that and that that is true of other individuals.

The Court: If that is all you want, you have a stipulation on it.

Mr. Lipson: Merely for the purposes of the record, I would like to Mr. King to identify his financial underwriting house.

By Mr. Lipson:

Q. Mr. King?

A. Our principal underwriter is Dillon, Read & Company, a New York investment—New York investment bankers.

Q. And have you discussed this matter with them?

A. Yes, I have.

Q. And have they indicated a willingness to underwrite—

Mr. Harrison: I submit that discussions between this witness and Read and Dillon are totally irrelevant.

The Court: Sustained.

Mr. Harrison: I would like to point out to the court again in connection with these objections that there is nothing that the company could sell or that Mr. Kayser could sell or that Mr. Boyd could sell to this witness or anybody else up to this date.

By Mr. Lipson:

Q. Mr. King, would Colorado Interstate Gas be interested [fol. 597-751] in using these assets to be divested for the purpose of eventually trying to enter the California market?

Mr. Harrison: I submit it is incompetent, irrelevant, and immaterial.

The Court: Sustained.

Mr. Harrison: What their aspirations and plans would be.

The Court: Sustained.

Mr. Lipson: I offer to show that Colorado Interstate Gas would be interested in using the Northwest Division assets to be divested for the purposes of eventually constructing a pipeline to enter and serve the California market.

Mr. Harrison: The offer of proof has been covered by the question, answer, and objection, may it please the court.

The Court: The objection is sustained to the offer of proof.

By Mr. Lipson:

Q. Is Colorado Interstate Gas Company able to enter the California market alone without using the assets of the New Company?

Mr. Harrison: I object. It is incompetent, irrelevant, and immaterial.

The Court: Sustained.

Mr. Lipson: I would offer to show that it would be im- [fol. 597-752] probable that Colorado Interstate Gas could enter the California market alone without using the assets of the New Company.

Mr. Harrison: That is fine. They don't need us then. They can go ahead.

The Court: The objection to the offer of proof is sustained. It seems to me all of this is getting us right square into the Federal Power Commission. Nobody is going to enter that market without certification, and the Federal Power Commission is going to look into everything you are talking about.

Mr. Lipson: I would hope that would be true, your Honor.

Mr. Harrison: The Federal Power Commission already denied the application of Colorado Interstate.

The Court: If you are talking about you would hope they would have that opportunity—

Mr. Lipson: I hope they will look into the matters you are referring to.

The Court: All right.

Mr. Lipson: Will the clerk mark this, please.

(Plaintiff's Exhibit 20 was thereupon marked for identification.)

By Mr. Lipson:

Q. I show you a document marked Plaintiff's Exhibit No. 20 for identification, Mr. King, and I ask you if that [fol. 597-753] document was prepared under your direction?

Mr. Harrison: May I see the document, please.

The Court: Who would be your chief executive officer?

Mr. Lipson: Your Honor, those are one of the details I hope the Federal Power Commission would be interested in and that this court would be interested in in a subsequent proceeding. I think it would be premature at this time.

The Court: I wondered if this fellow was going to be the chief executive officer. Is he the proposed chief executive officer? What is his name?

Mr. Lipson: Mr. Peter King.

The Court: Mr. King. All right, is this the proposal, that he would be the chief executive officer?

Mr. Lipson: No, your Honor, that is not the Government's proposal. The Government has no chief executive officer in its mind.

Mr. Harrison: It did have, and it was stipulated to in open court.

By Mr. Lipson:

Q. Was this document, Government's exhibit for identification number 20, prepared under your direction, Mr. King?

A. Yes, it was.

Q. What does it purport to show?

[fol. 597-754] Mr. Harrison: This is obviously a description of financial and operating data of the Colorado Interstate Gas Company and Northwest Division, El Paso Natural Gas Company.

Mr. Lipson: Your Honor, may the witness respond to the question.

The Court: Well, I think counsel is entitled to make an objection.

Mr. Lipson: Oh, I didn't know he was making an objection.

The Court: Well, it sounds to me as though he is getting ready to.

Mr. Harrison: On the face of this document, it is an analysis of the financial and operating data of the Colorado Interstate Company combined with the Northwest Division of El Paso Natural Gas Company. I submit to this court that the Colorado Interstate Gas Company is not a party to this suit, has no right to appear as a party to this suit, that its financial condition is totally irrelevant. There is nothing for sale to Colorado Interstate Gas Company at this time, and I object to any testimony with reference to this particular document.

Mr. Lipson: Your Honor, while Colorado Interstate Gas Company is not a party to the suit, the Government is presenting this in very summary form, if I may present it to [fol. 597-755] your Honor—

The Court: The more summary it is, the more objectionable.

Mr. Lipson: The nature of the proposal that Colorado Interstate would be willing to make and the competitive effects of that proposal on the natural gas pipelines in the Western part of the United States.

Mr. Harrison: May I submit to your Honor that there is nothing for Colorado Interstate Gas Company to buy at the present time. I submit it is not a party to this suit. It is in no position to make an offer. There is nothing for sale until this court makes a decree ordering that something should be sold. I submit that this evidence is totally irrelevant and that the financial condition of this company is totally irrelevant to this suit.

I submit there may be other companies that are financially even more responsible.

The Court: Do you want to respond to that?

Mr. Lipson: Your Honor, again, in fairness to the court, I think a full understanding of the nature of the proposal that Colorado Interstate would be interested in making could only be understood with reference to Government's Exhibit No. 20. It consists of tabulations as well as maps of the respective pipelines and how they would constitute a system, especially in relation to other pipelines already

[fol. 597-756] existing in the Western part of the United States.

The Court: If we ever get to a place where that is the way we divest, that is, by selling these assets to somebody else, whoever that somebody may be, it would seem to me that would be the time that we should look into this thing.

So far as the Government is concerned, the Government proposes—that is your proposal, really, in response to El Paso's proposal—you propose that the assets be sold to somebody.

Now, all you need to say is that there is somebody, this fellow, Paradox, Blythe and Company, Dillon and Read, whomever you want to indicate are interested, willing, and able to get into that kind of a transaction. Maybe we will have to peddle this thing ultimately, but I don't think so.

If we are right at that point, where we have to peddle it sometime, then this will be the time to hear this sort of business in detail. But at this juncture it is just an interruption. It is a delay, preventing us from getting about the business of conforming to the decree of the Supreme Court, obeying that decree, which is to divest without delay.

That is why I sustained the objections to all the interveners who wanted to come in and all of the petitions for amicus, except the Federal Power Commission. I [fol. 597-757] wanted to get this thing down to the bare bone so we could do something intelligible about it and make something intelligible out of it.

We could be going on here for the next ten years if we wanted to listen to all those interveners.

As soon as the word gets around that maybe this is going to go on the block, you will have more than three or four, I will wager.

Mr. Harrison: May I ask, if it please the court, whether it is the Government's proposal that the stock of the New Company shall be sold to Colorado Interstate Gas Company?

Mr. Lipson: For the record, I thought it was clear before, and I would like to emphasize it, that the Government is not sponsoring any one of the interveners as an individual

purchaser. We think that that can be determined in the kind of proceeding your Honor has just alluded to.

The Court: Later on.

Mr. Lipson: But so far as the proposal to sell to a third party, that is what the Government sponsors. And, in addition, your Honor, the Government also sponsors as an alternative to that proposal something along the line of the Reading decree that is described in some detail in our brief.

Mr. Harrison: This witness is certainly not relevant to [fol. 597-758] the so-called Reading decree. I submit, if counsel has made it perfectly clear that the Government does not advocate the sale to this company or any other particular company, but would merely advocate a sale, if that be the case, we have already stipulated that there will be buyers.

The Court: Yes, I think there will be buyers all right should that occasion ever arise.

Mr. Lipson: I would then like merely—your Honor has ruled on Government's Exhibit 20. I would like to put it in as an offer of proof if I may.

Mr. Harrison: It is identified. That is an offer of proof.

By Mr. Lipson:

Q. Mr. King, have you had an occasion to examine the proposed capital structure of the New Company as described in the El Paso divestiture plan?

A. Yes, I have.

Q. How does the proposed capital structure of New Company compare with the capitalization of other natural gas pipeline companies in the industry?

A. It runs considerably higher. The debt ratio runs considerably higher than the capitalization of other companies in the industry except for Florida Gas Transmission Company and Trans-Western Pipeline Company. Theirs are about the same.

(Recess had.)

(Plaintiff's Exhibit No. 21 was thereupon marked for identification.)

[fol. 597-759] By Mr. Lipson:

Q. Mr. King, I show you Government's Exhibit marked for identification 21 and ask you whether that document was prepared on behalf of Colorado Interstate Gas?

Mr. Harrison: May I see a copy, please?

A. Yes, it was.

By Mr. Lipson:

Q. What does that document purport to show?

Mr. Harrison: May I look at it before you examine the witness?

Mr. Lipson: Surely.

A. It shows financial data, including common stock data, net income, and capitalization ratios for thirteen natural gas transmission companies, plus the proposed New Company.

OFFER IN EVIDENCE AND OBJECTIONS THERETO

Mr. Lipson: I offer Government's Exhibit No. 21, your Honor.

Mr. Harrison: You what?

The Court: He offers.

Mr. Harrison: I would like to ask counsel the relevancy of it before I determine whether I wish to object.

Mr. Lipson: Perhaps in my discussion, your Honor would like to examine the document.

Mr. Harrison: It purports to show the capitalization setup of a whole—some fourteen and a half companies operating throughout the United States, and I don't know what that has to do with this case, may it please the Court, and I object to it as incompetent, irrelevant, and immaterial.

[fol. 597-760] Mr. Lipson: I would be glad to explain the relevancy to counsel, your Honor. This document, which is entitled, "The Comparison of Certain Natural Gas Pipe-

line Companies," purports to show various items concerning the capitalization, both the equity capitalization and the debt capitalization of a number of pipelines, including Transwestern, Florida Gas, Northern Natural, Panhandle Eastern, Texas Gas, Southern Natural, Transcontinental, Mississippi River Fuel, Tennessee Gas, United Gas, Texas Eastern, El Paso Natural Gas, Colorado Interstate, and the Pacific Northwest Pipeline that is at issue in this case.

It shows, your Honor, that—if I can merely draw attention to the one item called "Capitalization Ratios"—that the total debt capitalization of the proposed New Company, Pacific Northwest Pipeline, would be 74.6 per cent, which is extremely high, compared to every other long-established pipeline company.

The Court: 74.6 per cent of what?

Mr. Lipson: Of debt, as compared to 25.4 per cent equity. For example, Colorado Interstate's debt capitalization was only 52.2 per cent, El Paso's own is 69.2 per cent, Texas Eastern is 65.6 per cent, United Gas is 54.8 per cent and—well, I will continue—Tennessee Gas, 62.3 per cent;—

Mr. Harrison: I submit it shows all these things, but I submit it is irrelevant. I can read the exhibit, too, just [fol. 597-761] as the Court can.

Mr. Lipson: I haven't completed my explanation.

Mr. Harrison: I am objecting to the exhibit, and he is reading it into the record. I don't know what the purpose of that is, your Honor.

Mr. Lipson: The importance, your Honor—

The Court: He is trying to get it in the record, I guess.

Mr. Lipson: In order to understand the conclusion that I draw from this, your Honor, it is useful to have the figures in one's mind. The relevance of this is, as Mr. King is prepared to testify, that a company as highly capitalized as New Company will be after this divestiture will be in no position to increase what is at present one of the highest debt capitalization ratios in the industry. This would seriously hamper New Company's ability to build any kind of expansion to serve the California market in the reasonably

near future and I think that is the chief relevance of this document, your Honor, and I would like to have the matters brought out by the testimony of Mr. King. I think the figures are all that appear on this chart, and I think those are indisputable and the argument can be made from the figures.

The Court: Well now, you are talking about a different subject than you have been discussing with this witness up to the present.

[fol. 597-762] Mr. Lipson: That is correct, your Honor.

The Court: You are not now talking about him as a purchaser.

Mr. Lipson: That is right, your Honor.

The Court: You are now talking about El Paso's plan—you are criticizing that—

Mr. Lipson: Yes, your Honor.

The Court: Objection overruled. You may proceed.

Mr. Harrison: May I ask the witness the source of the information, your Honor, please?

The Court: Yes.

Voir dire examination.

By Mr. Harrison:

Q. What is the source of this information?

A. It was prepared at my request by Dillon, Read and Company.

Q. From what source is it?

A. They used annual reports of the various companies.

The Court: How do you know they did?

The Witness: I saw them using annual reports, your Honor, on certain of these companies.

By Mr. Harrison:

Q. Did you check these against the records of the Federal Power Commission?

A. No, sir.

Q. Did you examine the records of the Federal Power Commission with respect to these figures?

[fol. 597-763] The Witness: No, sir.

The Court: It looks to me, Mr. Lipson, as though you are right back trying to do the same thing you have been objecting to all morning.

Mr. Lipson: No, your Honor. Mr. King here has testified he observed these procedures going on here. He said these procedures were performed at his request on behalf of his company.

Mr. Harrison: The perfectly simple source of this material is the Federal Power Commission and he goes and gets Dillon, Read, his banker, to get up these materials for him and they are not here. I object to them as incompetent, irrelevant and immaterial and no proper foundation laid.

The Court: It sounds to me, Mr. Lipson, as though you are doing the same thing you have been objecting to all morning. Dillon and Read got these things up. In El Paso's case, Abbott, Proctor, and Paine got that particular one up. Now, you said this morning that you were deprived of an opportunity to cross-examine. Well, so is Mr. Harrison now deprived of an opportunity to cross-examine the fellows who got these up in Dillon and Read. I think this is strange. We spent all morning talking about this question of evidence, and here you are doing the very same thing.

Mr. Lipson: Your Honor, may I suggest that it is not the same thing, because in this activity Dillon-Read was [fol. 597-764] acting as an agent for Mr. King. In the activity discussed this morning, these various brokerage houses were in no sense acting as agents for El Paso Natural Gas Company.

The Court: They certainly were not, and that is a guarantee of authenticity that isn't present in respect to your offer.

Mr. Harrison: Dillon-Read has a financial interest in proposals to be made by this company.

The Court: Yes. There is a guarantee of authenticity in the El Paso offer that isn't present in yours. You are in worse shape, in other words, and here you are offering that thing.

Mr. Harrison: This material is procurable from a public record of the Federal Power Commission.

Mr. Lipson: Part of the public record of the Federal Power Commission, your Honor, are the annual reports which Mr. King said these things were taken from, these figures.

Mr. Harrison: I don't think I need to reply to that.

The Court: No, I don't think so. The objection is sustained.

Mr. Lipson: With the court's permission, I would like to have the opportunity to call one of the vice presidents of Dillon-Read to testify.

[fol. 597-765] The Court: I don't know anything about that. I never suggest to counsel how to prove their cases. You just go ahead in any way you see fit, and we will see whether it is any good.

By Mr. Lipson:

Q. What would be the effect of a high debt-to-equity ratio of 75 per cent debt to 25 per cent equity have on New Company's ability to expand operations to serve an additional market such as the California market?

A. It would make it very difficult for New Company to do any major new financing for quite a number of years down the road.

Q. How much additional equity capitalization would New Company need to facilitate an expansion of that nature?

Mr. Harrison: I don't understand the question. It is totally indefinite. Anything that will facilitate something —I don't understand that.

Mr. Lipson: May I rephrase the question then.

By Mr. Lipson:

Q. What would you consider an appropriate debt-to-equity ratio that would enable New Company to build an extension to serve the California market?

A. Well, I can't speak of it in those terms. We would have to talk in terms of specific figures. I will say that New Company would be in a much stronger position financially if its debt ratio were 65 per cent, rather than the 75 per cent it is, and it would be in a much better position to do [fol. 597-766] additional financing, as, for example, a line to California.

Q. How much additional equity capital would be required to bring New Company's debt ratio down to 65 per cent?

A. Approximately 24 million dollars.

Q. Mr. King, have you had an opportunity to check the accuracy of El Paso's estimated earnings for New Company of 7.1 million dollars?

A. We ran a test on it.

(Plaintiff's Exhibit 22 was thereupon marked for identification.)

By Mr. Lipson:

Q. I show you Government's Exhibit marked No. 22 for identification, and I ask you who prepared that document?

A. That was prepared at my direction by our treasurer.

Q. Does this summarize the check that you just referred to on the earnings of New Company?

A. That is right. This is a rule of thumb test that we used to check the earning power of a regulated company.

Q. Would you describe what this document indicates with respect to the projected earnings of New Company?

Mr. Harrison: I would like to ask the witness on voir dire concerning—

The Court. Go ahead.

[fol. 597-767] Voir dire examination.

By Mr. Harrison:

Q. What is the number?

A. 22.

Q. Calling your attention to Plaintiff's Exhibit 22 for identification, I would like to ask you what was the source of your figure $335,472 for utility plant?

A. El Paso's pro forma balance sheet as of December 31, 1964.

Q. As it appears in the proposed plan for divestiture?

A. Yes.

Q. What about the reserves and adjustment totaling $102 million?

A. They all show in the balance sheet.

Q. So they are all taken from the plan for divestiture?

A. Right.

Q. Now we get down to the working capital, is that the same?

A. No. That is an estimate we make.

Q. What was the source of your estimate?

A. Well, it is just a round figure as to approximately what forty-five day's working capital might be. It does not purport to be a precise figure. It could vary several million dollars either way.

Q. Coming down to the return. I suppose that is fifteen million dollars, is it? What is that fifteen?

A. That would be the gross income.

Q. What is the amount of it?

[fol. 597-768] A. Well, fifteen million dollars is the return produced by a 6¼ per cent rate of return on a $240 million rate base.

Q. That is the way you figure it?

A. That is correct.

Q. That has nothing to do with any of the information that has been testified to here received by El Paso Natural Gas Company from its customers in the Northwest concerning their projected demands?

A. Well, this is prepared on an entirely different basis. The only earning power the New Company has is its rate base in effect. This is an attempt to determine what that earning power would be.

Q. What you did was take 6¼ per cent of the rate base as it appears—

A. We assume the Federal Power Commission would allow for these purposes a 6¼ per cent rate of return.

Q. Did you make any investigation what the actual earnings of Pacific Northwest Pipeline systems were?

A. Yes. I know that through 19—I think the highest earnings Pacific Northwest has had to date were in the calendar year 1963 in the order of 5.1 million dollars.

Q. What is the source of that information?

A. Well, this was developed by our people from information submitted by El Paso in connection with the settlement of the Northwest Division rates.

[fol. 597-769] Q. Will you please produce it. I would like to look at it.

A. I don't have that with me.

Q. Will you produce it this afternoon, please?

A. I don't have the underlying material with me.

Q. You did not conduct any inquiry among the markets of Pacific Northwest as to what the projected earnings of the company would be in the years to come?

A. Well, no, sir. And for these purposes this would not be relevant.

Mr. Harrison: Well, I move to strike the words, "And for these purposes it would not be relevant."

By Mr. Harrison:

Q. The fact is you did not do it, is that correct?

A. No, I did not.

The Court: Just hold on here. Those words are stricken.

A. No, I did not.

By Mr. Harrison:

Q. Did you consult any other source of information other than to make an arithmetical calculation of 6.25 per cent on a $240 million rate base?

A. I took the nine million sixty-five thousand of income deductions and other income.

Q. Where did you get that?

A. From the El Paso pro forma income statement.

Q. As appears in the plan of divestiture?

[fol. 597-770] A. Yes.

Q. So that every figure that appears in this chart is taken from the plan of divestiture except the arithmetical calculation of 6.25 per cent of $240 million?

A. The working capital doesn't appear.

Q. That is a relatively important matter, isn't it?

A. That is right.

Q. Six and a quarter per cent comes from the last decision of the Federal Power Commission, I take it?

A. No. We just selected that as a rate of return that on the basis of recent decisions that New Company might be expected to earn.

Q. In other words, you are assuming that that is the limit that the Federal Power Commission, in its decisions in the years to come, will allow it to earn?

A. No. I am assuming that on the basis of present regulatory policy this is approximately what it will be allowed to earn.

Q. In the future?

A. Yes.

Q. You are assuming the Federal Power Commission will adhere to such a rate as this and limit the company to earnings accordingly?

A. Within a range, yes.

Q. What range?

A. Well, possibly within a quarter of a per cent either way.

[fol. 597-771] Q. It might be six and a half, it might be six?

A. Yes.

Q. Isn't it a fact that in the regulatory practice there is a lag involved in the matter of income and rate fixing? Is there or is there not?

A. I beg your pardon?

Q. Is there a term you use in your industry called "The lag in the regulatory process"? Have you ever heard that?

A. Yes.

Q. So that actually what the Federal Power Commission fixed as a rate of return in a year selected for study for that purpose—that is what they do, don't they?

A. Yes.

Q. (Continuing) —is not necessarily what the earnings actually are then or in the future?

A. That is correct.

Q. So that this is merely an application of a rate that you selected that you believe the Federal Power Commission would adopt in the future and apply to the rate base shown in the plan for divestiture?

A. Yes. And that if the earnings succeeded this—exceeded this by a substantial amount, the company would be invited in by the Federal Power Commission to discuss a rate reduction?

Mr. Harrison: Now, I suggest we haven't gotten to that point, if your Honor please. It is a volunteer statement [fol. 597-772] and I move it be stricken.

The Court: It is certainly stricken.

Mr. Harrison: I have no further questions.

Mr. Lipson: Is there an objection to the document, Mr. Harrison?

Mr. Harrison: I beg your pardon?

Mr. Lipson: I asked: Is there an objection to the document?

Mr. Harrison: No.

The Witness: That is my copy, Mr. Harrison.

Mr. Harrison: You may have it. I will get another one.

OFFER IN EVIDENCE

Mr. Lipson: I offer 22, your Honor.

The Court: What is it?

Mr. Lipson: I offer 22, Government's Exhibit 22, the estimated Pacific Northwest rate base and projected future earnings.

The Court: Received.

(The document marked Plaintiff's Exhibit 22 for identification was received in evidence.)

Mr. Lipson: I have no further questions of Mr. King.

Mr. Harrison: I have no questions.

The Court: Step down.

(Witness excused.)

The Court: We will recess this matter until 2:00.

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[fol. 597-773] Afternoon Session

The Court: All right, proceed.

Mr. Harrison: If your Honor please, there was considerable argument over the admissibility of an exhibit which actually had not been offered. I will now offer it. It is an offer of an exhibit on behalf of El Paso Natural Gas Company, supplement to Defendant's Exhibit H, showing partial list of beneficial owners of stock held of record by brokers and nominees included in holders of 1,001 shares and above, which are 1625 shareholders of record and number totaling 10,399,775 shares of record, together with the responses supporting the summary so described.

Mr. Lipson: Your Honor, the Government withdraws the objection to the exhibit just described by Mr. Harrison with the understanding—and I believe Mr. Harrison can

check me on this—that the Government would be free to obtain additional information that it feels needed to supplement the information contained therein.

Mr. Harrison: Yes, surely.

REOFFER IN EVIDENCE

Mr. Lipson: The Government reoffers Plaintiff's Exhibit No. 21, the tabulation "Comparison of Certain Natural Gas Pipeline Companies" dated January 20, 1965. I understand Mr. Harrison is withdrawing his objection to that exhibit.

The Court: Is that so?

[fol. 597-774] Mr. Harrison: Yes, we made a trade, your Honor.

The Court: You just spent two weeks of my time sitting around here waiting for you. I should have thought you might have done that before you got here. All right, they are both received.

(Defendant's Exhibit R was marked for identification and received in evidence, and Plaintiff's Exhibit 21 was received in evidence.)

Mr. Lipson: The Government now wishes to call Mr. O. L. Carson to the stand.

O. L. CARSON called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lipson:

Q. Will you state your name for the record.
A. O. L. Carson.
Q. Where do you live, Mr. Carson?
A. Salt Lake City.
Q. And what is your occupation or profession?

A. I am an engineer by profession, and I am president of Paradox Production Corporation.

Q. Will you give us a resume of your education, training and experience.

A. I am a mechanical engineer out of Oklahoma University in 1924. From '25 to 1930 I worked for Waite Phillips [fol. 597-775] Oil Company at Tulsa, Oklahoma as superintendent of natural gasoline plants, and in 1930 I joined the Panhandle Eastern Pipeline Company of Kansas City, Missouri as chief engineer for the design and construction of one of the first large diameter high-pressure natural gas pipelines. In 1935 I joined the Fluor Corporation of Los Angeles, California, and in 1936 I opened a division office for them in Houston, Texas. In 1937 I was appointed chief engineer of Phillips Petroleum Company, Bartlesville, Oklahoma. And in 1940, or late '40, '41 I entered the consulting business in Houston, Texas. With the outbreak of the war in '41 I joined the Graver Construction Company, a division of Graver Tank and Manufacturing Company of Chicago, Illinois as southern division manager in Houston, Texas. In 1948 I was appointed general manager of the Tellepsen Petro Chem Constructors of Houston, Texas. In 1954 I formed a company, Carson-Wolf Company. In 1955 I joined the Fish Northwest Constructors as chief engineer for the Pacific Northwest Pipeline project. In 1957 I resigned and was one of the founders of Paradox Production Corporation.

Q. Under what conditions was Paradox organized?

A. Well, Paradox is a publicly-owned Nevada corporation organized by employees of Fish Northwest and Pacific Northwest, and Salt Lake businessmen. In 1957, after El Paso had secured the stock of Pacific Northwest Pipeline [fol. 597-776] and it was organized for the purpose of exploring for and producing oil and gas properties.

Q. What did the founders of Paradox have to do with the Pacific Northwest Pipeline?

A. Well, among the founders of Paradox J. W. Hall was the general manager of Fish Northwest Constructors.

Don C. Creveling was manager of the Rights of Way and Land Department. Moriss C. Foster was assistant to Don Creveling in the Rights of Way and Land Department. Bob Garabrant was head of the gas measurement section, and R. C. Appling was supervisor of the testing of the main line and then ended up in charge of gas and gas dispatching for Pacific. And Bruce Hester was chief clerk of the construction department. Joe Fitzgerald was an attorney for the Rights of Way and Land Department. And one boy—I can't say his last name—was the designer of all the electrical work in the communications. And myself. I got my knowledge of it as chief engineer of design and construction.

Q. Does Paradox—let me digress for a moment. Does Paradox currently have a lawsuit against El Paso Natural Gas Company?

A. Not Paradox. Paradox has a 47 per cent ownership of Utah Gas Pipelines, which has a lawsuit against El Paso and other people.

The Court: What is the percentage of ownership?

The Witness: Forty-seven per cent.

[fol. 597-777] By Mr. Lipson:

Q. Does Paradox have a proposal for the acquisition of assets of the former Pacific Northwest Pipeline about which this proceeding revolves?

A. Yes. We are interested in buying the assets after they are divested, and we, I think, have given the information to the proper authorities.

Q. Have you made this proposal known to the El Paso people?

A. Yes. On May 22nd we wrote a letter to Mr. Boyd stating that—reiterating some of the things, a history of Paradox, stating that we were interested in purchasing the assets that were to be divested.

Q. Were there any subsequent communications?

A. Yes. I happened to be in New York on June 2 and I hadn't had any answer at that time. So I called Mr. Boyd's office and I was advised by his secretary that he had already answered my letter. And then when I returned on June 5th or 6th I received Mr. Boyd's letter which said that they had noted our interest in the divestiture.

Q. Did you contact the El Paso people subsequently about the same matter?

A. Yes. On June the 18th, I believe, we wrote another letter reiterating our desire to be considered as purchaser of the assets when the divestiture had been ordered.

Q. Have you received a reply to that letter?

A. No, sir.

[fol. 597-778] Q. Who are the financial bankers who have been obtained by Paradox with respect to this proposed acquisition?

Mr. Harrison: I submit that is incompetent, irrelevant and immaterial. We are prepared to stipulate that the witness is interested in buying the company when it is formed. Nothing for sale at the present time. The financial condition of this company is immaterial.

Mr. Lipson: Well, I think the nature of the persons who are behind the Paradox Production Corporation's interest in this company are definitely relevant to determine whether or not this man speaks with some financial backing or whether he is not speaking with some financial backing.

Mr. Harrison: I submit no decree has been made which provides for any sale of property, assets or stock. New Company hasn't been formed; there is nothing for sale. The question is irrelevant to the present investigation.

The Court: Well, I think the Government is entitled to show that since—I withdraw that. Since the Government's proposal is to transfer these assets to some company that folks entirely independent of El Paso have organized. I think they are entitled to show they are not just talking through their hat, that they have somebody, or maybe

more than one outfit, who is ready, able and willing. I think they are entitled to say where they are going to get the money, only in a general way. It has been mentioned in [fol. 597-779] respect to the—Trans-Western is the one preceding this?

Mr. Lipson: The Colorado Interstate Gas that Dillon and Read—

The Court: Colorado Interstate Gas said that Dillon and Read are expected to finance that one. I think they are entitled to show that.

By Mr. Lipson:

Q. Would you state the names of the financial backers.

A. The Morgan Guaranty Trust of New York City; the Bear Stearns and Company of New York City, member of the New York Stock Exchange, and the Massachusetts Protective Association of Worcester, Massachusetts. We have received letters from these people putting us in a position to furnish all the capital required to make the purchase—

The Court: Well, I think that is all hearsay. That is stricken, what letters you have received. All right.

By Mr. Lipson:

Q. What is the business of the Massachusetts Protective Association—I don't believe you stated that.

A. They are in the insurance business.

Q. For what purpose does Paradox seek to obtain these assets to be divested?

A. Paradox would seek to purchase these assets for the sole purpose of operating the pipeline system as a complete, independent arm of the natural gas business. And it is our belief that our responsibility would be to satisfy [fol. 597-780] the gas demands—

The Court: Oh, well now.

A. All that is required—

The Court: Just wait a minute. Who cares what their belief is? That is stricken.

Mr. Lipson: Your Honor, may I merely observe that the intention of a prospective purchaser is relevant in the proceedings, whether they want to operate as a going pipeline—

The Court: He has already testified.

By Mr. Lipson:

Q. What are the plans of Paradox with respect to the management team that would operate the new pipeline facilities?

A. Well, primarily—I believe you have an organization chart that we gave you—all of the people on that chart were either in top management positions with the original Pacific organization, or in supervisory positions, and have been elevated to top management positions. I have contacted these people, and if we are successful in the purchase they are willing to be a part of Paradox.

(Plaintiffs Exhibit No. 23 was thereupon marked for identification.)

By Mr. Lipson:

Q. I show you Government's Exhibit marked No. 23, and ask if this is the chart you have just referred to?

[fol. 597-781] A. May I have a copy?

Q. Yes.

A. Yes, it is.

Offer in Evidence

Mr. Lipson: I offer the chart, your Honor.

Mr. Harrison: May I take a look at it, please, a second? May I ask the witness one or two questions?

The Court: Yes.

Voir Dire examination.

By Mr. Harrison:

Q. I notice this document has at the top of it a sheet with a chart marked "President, Vice President, Secretary, Treasurer, General Counsel," various names inserted for these various positions. Are they working for your company now?

A. No, sir.

Q. These are people that you would hope to become associated with Paradox Company if you made this acquisition?

A. People I have talked to regarding it.

Q. I see. And have you made your arrangement for their salaries or terms of office?

A. I would say that would be a little premature. We don't know whether we are going to buy it or not.

The Court: This whole business is premature.

Mr. Harrison: That is what I wanted to bring out, if your Honor please. This is simply a piece of speculation [fol. 597-782] of the witness about some people who may go to work for him or his company, if they should purchase the New Company at some future date, and therefore it is irrelevant.

The Court: Well, I think they ought to show who is going to be the executive head of this, at least. Who have you got down there as executive head?

Mr. Lipson: Pass it up.

The Court: No, I don't want to see it. Just tell me about it.

Mr. Lipson: The president, O. L. Carson; assistant to the president, J. W. Hall; H. R. Garabrant; vice presidents J. Don Creveling, another vice president Allen B. Hiatt.

The Court: Let's just start with that first one. Who is he?

Mr. Lipson: The first vice president, Mr. Creveling?

The Court: No, the president.

Mr. Lipson: Mr. Carson is the witness on the stand, your Honor.

The Court: Oh, it is Mr. Carson.

Mr. Lipson: I believe Mr. Carson identified Mr. Creveling.

Direct examination (contd.)

[fol. 597-783] By Mr. Lipson:

Q. Who is Mr. Creveling, Mr. Carson?

A. He is one of the founders and still a director of Paradox.

Q. Was he previously associated with Pacific Northwest Pipeline Corporation?

A. Yes, he was.

Q. In what capacity?

A. As manager of the Rights of Way and Land Department.

Q. What is his present occupation?

A. He is retired and does consulting work.

The Court: How old is he?

The Witness: About 65 or 66, possibly.

By Mr. Lipson:

Q. Mr. Allen B. Hiatt, will you identify him, sir?

The Court: Well, let's not go through all of those. The exhibit may be received.

(The document marked Plaintiff's Exhibit 23 for identification was received in evidence.)

By Mr. Lipson:

Q. Is there any relationship—strike that, and I will rephrase it.

Is Paradox independent of El Paso Natural Gas Company?

A. Yes, it is.

Q. Would it remain so after this divestiture proceeding?

A. Yes, it will.

Q. What are Paradox's plans with respect to competi-
[fol. 597-784] tion with El Paso?

Mr. Harrison: Well, if your Honor please, I submit that this is going pretty far afield. The witness has already said his testimony is premature about even hiring any of these people.

The Court: The whole thing is premature, Mr. Lipson. The fact of the matter is that if we ever arrive at the point where the Court determines the way to handle this divestiture is to find a purchaser and sell him these assets, why, we are going to have to have the most detailed information about anybody who wants to make an offer, and it is going to be on a basis of a very careful investigation.

Now, all you are doing here today, and all you are entitled to do, it seems to me, is to show that there is someone who is interested and ready and able and willing to make some proposals if we ever arrive at the point where there is a sale situation.

Now, the only reason I am letting this in at all is that you offer it on the basis that you have proposed a sale as an alternative to the divestiture proposal of the El Paso Natural Gas Company, and you say you think it is the Government's obligation, that you have proposed a sale, that you show that a sale can be made. And you say that, in order to show that a sale can be made, it is your obligation to show that there are some purchasers around who [fol. 597-785] might be interested, who are interested, and who are ready and able and willing and whom the Court at a proper time might make some investigation into.

I don't think you are entitled to go beyond that at this point in this proceeding, because we haven't yet made that determination.

Mr. Lipson: I understand that, your Honor.

The Court: All right.

Mr. Lipson: Just one further question of the witness, if I may.

The Court: Surely.

By Mr. Lipson:

Q. What markets would Paradox seek to serve it were able to acquire this pipeline company?

A. It would serve all the present markets, and it would be—make an effort, if it could get the reserves available, to enter the California market.

Mr. Lipson: I have no further questions.
The Court: And if you could get certification.
Mr. Harrison: Are you through?
Mr. Lipson: Yes, sir.

Cross examination.

By Mr. Harrison:

Q. When would you expect to enter the California market and with what quantity daily?

A. Mr. Harrison, I couldn't answer that question until [fol. 597-786] we get the pipeline.

Mr. Harrison: Thank you. That is all.
Mr. Lipson: I have no further questions, your Honor.

(Witness excused.)

[fol. 597-787] Mr. Lipson: The Government next calls Mr. Roger L. Conkling.

Roger L. Conkling, called as a witness by the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lipson:

Q. Sir, would you please state your name, address, and position.

A. My name is Roger L. Conkling. My business address is 917 Executive Building, Portland, Oregon. I am presi-

dent and director of Pacific Western Pipeline Corporation. I am also president of Conkling, Incorporated, a consulting firm.

Q. What type of consulting work does Conkling do, Conkling, Incorporated?

A. The firm advises natural gas pipeline clients with respect to markets, rates, operations, and other matters, and, in addition, represents these clients in proceedings before the Federal Power Commission. In addition to natural gas, the firm is active in natural resources, the electric power, and general economic fields.

Q. For what purpose was Pacific Western Pipeline Corporation formed?

A. Pacific Western was formed with the objective of negotiating with the El Paso Natural Gas Company for the acquisition of the properties which were to be divested [fol. 597-788] by that company pursuant to the Supreme Court's order of April 6, and with the further objective of managing, operating, maintaining, and expanding those properties as a strong, independent, and viable pipeline system, assuming that our negotiation efforts were successful.

Q. Has Pacific Western Pipeline Corporation taken any position with respect to negotiating with El Paso for these properties?

A. No, sir. We have followed a very strong policy position of our board and of our financial advisors, Blythe and Company, not to seek to influence in any way a decision with respect to any preferred plan of El Paso which might contemplate divestiture by means other than to an outside group.

However, in the event that the decision was that divestiture should be to an outside group which could demonstrate strength, independence, and viability, we wish to be in a position to negotiate with El Paso. Accordingly, our corporation was formed shortly after the Supreme Court's decision, and, as a matter of courtesy, El Paso was first to be advised of the existence of our group.

Q. Who were the founders of Pacific Western Corporation?

A. The founders of Pacific Western are a group of Westerners who are now directors, or officers and directors, of the corporation. Do you wish their names now, Mr. Lipson?

Q. I think it would complete the record if you could give us the names, yes, sir.

[fol. 597-789] A. All right. If I may refer to my notes, I will just read the roster of our directors and officers. The chairman of the board is Thomas W. Dant. Mr. Dant is chairman of the board of Dant and Russell, Inc., of Portland, Oregon.

The directors who are not officers are as follows: Mr. Norman H. Biltz. Mr. Biltz is a financier, cattleman and rancher of Reno, Nevada. Mr. William E. Boeing, Jr. Mr. Boeing is director of the General America Corporation and also director of the Pacific National Bank of Seattle. Mr. Boeing is of Seattle, Washington. Mr. William H. Ferguson, an attorney-at-law, partner of the firm of Ferguson & Burdell, also of Seattle, Washington. Mr. R. V. Hansberger, president, Boise Cascade Corporation of Boise, Idaho. Mr. Monford A. Orloff, chairman of the board of Evans Products Company, director of the Great Western National Bank, Portland, Oregon. Mr. Alfred R. Thomas, a director of the Cyprus Mines Corporation, a director of the Continental Baking Company of Los Angeles, California. I, Roger L. Conkling, am president and director of the corporation. Our executive vice president and also a director is Mr. Robert E. Maloney. Mr. Maloney is president of Malco Gas Products Corporation of Klamath Falls, Oregon.

The vice president, secretary, and director is Mr. Wilbur F. Mathewson, an attorney-at-law of San Francisco, California. Vice president, assistant secretary and director is Mr. Henry A. Carey, Jr., an attorney-at-law, partner of [fol. 597-790] the firm Carey and Epstein of Portland, Oregon. The treasurer is Mr. Edward J. Pisenti, certified

public accountant, a partner in the firm of Carter, Pisenti, and Brinker of Santa Rosa, California.

Directors who have been added since the original incorporation, who have been nominated, and who have accepted nomination and who will assume their responsibilities if we are successful, of those whom I have named, are Mr. Boeing, Mr. Ferguson, Mr. Hansberger, Mr. Orloff, and Mr. Thomas.

That completes the list, Mr. Lipson.

Q. Is Pacific Western itself affiliated with any other gas distribution company, gas pipeline company, or gas producer?

A. No, sir. There is no affiliation of any kind.

Q. Would Pacific Western be in a position to compete for the California market?

A. Yes, sir, I believe we would, for that market or any other.

Q. Is Pacific Western financially able to acquire the properties to be divested?

A. Yes, we are. Our financial counselors, Blythe and Company, have advised us that in their opinion—

The Court: Now, that is all hearsay, what they advised you.

By Mr. Lipson:

Q. What is Blythe and Company?

A. Blythe and Company is one of the nation's largest investment firms. The company has participated in the [fol. 597-791] underwriting of most of the major issues of natural gas securities in recent years.

Mr. Harrison: May I submit that Blythe and Company is not on trial here, and I object to it and move the answer be stricken.

The Court: The objection is sustained. It is stricken.

By Mr. Lipson:

Q. Do you have a source of working capital, Mr. Conkling?

A. Yes, sir. The Bank of America.

Q. Has Pacific Western formulated an outline of a proposed plan or plans of acquisition?

A. Yes, sir, we have.

Q. Do you contemplate that any plan would be subject to the approval by this Court and the Justice Department?

A. Yes, we do.

The Court: Well, it doesn't make any difference whether they do or not. That is what we are going to do.

By Mr. Lipson:

Q. Does Pacific Western require any additional information from El Paso in order to formulate a precise proposal?

A. Yes, we do, Mr. Lipson. The only information which is available to us is the information which is of record in these proceedings. And that information is not sufficient for us to formulate a firm bid. However, I might add that [fol. 597-792] I believe that the additional information which we need could be readily compiled by El Paso.

Q. Have you submitted to El Paso any of the plans that you have in contemplation?

A. Yes, sir, we have. I first advised Mr. Kayser of the existence of our group and of our desires to negotiate for the properties upon the occasion of a visit to his office in New York City on May 25, 1964. Now, of course, any plan—

Mr. Harrison: The witness is not addressing himself to the point of the question, if your Honor please. I suggest we proceed with question and answer.

The Court: Sustained. It is stricken.

By Mr. Lipson:

Q. Have you had occasion to negotiate with the officers of El Paso respecting your proposals?

A. Yes, sir. We have addressed by letter a proposed plan of acquisition which would result in saving the twenty-four and a half million dollars of tax payments to which Mr. Boyd has testified. We have not outlined what I will call a conventional plan of acquisition, because we think the details of such a plan are obvious.

Q. Have you received any further information from El Paso?

A. No, sir.

Q. Have you requested such additional information?

A. Yes, we have, by letter of July 27, addressed to Mr. Boyd. We requested of El Paso the information which we [fol. 597-793] felt we would need in order to prepare a firm bid.

Q. Other than the members of the board of directors whom you have named, what are your plans for staffing Pacific Western as an operating pipeline company should you be able to obtain the properties?

A. We would plan to employ to the fullest extent possible the employees of El Paso who are now presently engaged in Northwest Division activities, except, of course, for the few top policy-making positions. With respect to those few top policy-making positions, which should be filled by executives who have had no prior affiliation with El Paso, my acquaintanceship in the industry is far-reaching and brings me into contact with executives of the industry throughout the country. And, while I cannot be specific unless and until we are successful, I believe I can state with assurance that the executives whom we would employ to occupy these positions would be top level in all respects and would come to us from positions of commensurate responsibility.

Mr. Harrison: I submit the witness is getting quite discursive and far from the question.

Mr. Lipson: I won't pursue that particular line any further, your Honor.

By Mr. Lipson:

Q. Mr. Conkling, have you ever operated a pipeline company or have you had any experience in that line?

A. No, I don't believe that I have operated a pipeline [fol. 597-794] company in the sense of your question, Mr. Lipson.

Mr. Harrison: I submit the question has been answered already, if your Honor please, that he has not.

The Court: Yes.

The Witness: On the—

The Court: Well, that is the answer.

By Mr. Lipson:

Q. Have you had any experience similar to that?

A. Yes, I have.

Q. Would you describe it?

A. My entire life, my entire professional life, has been concentrated in the utility industry. I have occupied a high executive position in the electric segment of the utility industry. The last seven years, as a consultant, I have been in contact on a highly responsible basis with industry executives, all phases of the industry, producers, pipelines, and distributors. And this has given me a very broad and diversified experience at a highly responsible level.

Q. Mr. Conkling, you mentioned a position in the electrical phase of the utility industry. What position is that you referred to?

A. It was with the Bonneville Power Administration.

The Court: The what?

The Witness: The Bonneville Power Administration, your Honor, an electric system owned by the Federal [fol. 597-795] Government, which is one of the largest in the world.

Mr. Harrison: It is a matter of law what the Bonneville Administration is. I don't think we need a discourse from the witness.

Mr. Lipson: Thank you. You have answered the question.

The Court: What was your job there?

The Witness: Your Honor, with Bonneville I was responsible for—

The Court: What was your job?

The Witness: (continuing) —system operations.

The Court: What was your job?

The Witness: The title, your Honor, was assistant to the administrator, and my responsibilities were threefold: system operations, commercial operations, and budgetary operations. System operations encompassed the actual physical—

The Court: Never mind. That is enough.

The Witness: Yes, sir, thank you.

By Mr. Lipson:

Q. What markets would Pacific Western be prepared to serve if it obtained these properties?

A. We would be prepared to serve—

Mr. Harrison: I submit this is purely conjectural.

The Court: Certainly they would have to be certified.

Mr. Lipson: I understand that.

The Court: By the Federal Power Commission.

[fol. 597-796] By Mr. Lipson:

Q. Subject to all those contingencies, what markets would you attempt to serve?

Mr. Harrison: What the witness would attempt is immaterial.

The Court: It is wholly immaterial and irrelevant. I could attempt to run one, but it would be highly speculative if I attempted it. Making an attempt doesn't help us along the road in a solution of the problems here.

Mr. Lipson: I would offer to show by the question that the witness would state that Pacific Western would intend to use the New Company's facilities as a base for expanding into the California market.

By Mr. Lipson:

Q. Under any of the plans that you have contemplated, Mr. Conkling, to what extent would the ownership of Pacific Western be separated from the ownership of El Paso Natural Gas Company?

A. Under all of the plans which we have contemplated the ownership would be completely separate.

Mr. Lipson: I have no further questions.

Mr. Harrison: I have no questions, your Honor.

The Court: Step down.

(Witness excused.)

[fol. 597-797]

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Lipson: At the moment, your Honor, I would like to address myself to the proposal made by Mr. Harrison at the opening of the proceedings this morning.

The Government objects to the proposal that he made this morning, which, as we understand it, would defer any decision on the ownership of New Company for an indeterminate period. This, of course, is of paramount importance to us.

The Court: Not indeterminate.

Mr. Lipson: Well, no date was given by Mr. Harrison.

The Court: Three months.

Mr. Harrison: Your Honor, I didn't suggest any particular date this morning, but I certainly think that would be ample time within which to determine these things.

One difficulty I see with the whole problem at present is we have witnesses talking prematurely about plans to acquire New Company that hasn't been formed and won't

be in business and won't have its assets for a year from now.

I fail to see why we should attempt to necessarily determine the final method of distribution of these shares, whether by sale to individuals or on the market for distribution when we don't have any to distribute and when it still seems to be quite a contentious matter between the parties.

The Court: Let me talk to you both about this a little informally now.

[fol. 597-798] Is your evidence closed now?

Mr. Lipson: Yes, your Honor.

The Court: Is your evidence closed?

Mr. Harrison: There is only one thing, if your Honor please. We have two documents that were to be added to an exhibit introduced by counsel that we would like to put in the box, because the exhibit was incomplete.

Have you any objection, Mr. Lipson?

Mr. Lipson: I haven't seen the document.

Mr. Harrison: Well, perhaps we can satisfy counsel after court is over, your Honor.

Mr. Lipson: I don't think my position is unreasonable, your Honor. If I haven't seen the papers—

Mr. Harrison: Well, you put them in the first time.

The Court: Nobody is talking about that, Mr. Lipson. Let's see if you fellows can't agree. If you can't, why, tell me about it.

I would like to ask Mr. Harrison something more about his motion, and then we will discuss it.

Mr. Harrison, would you like to come up here. Why don't you sit down where you are and talk to me about it. This is tiresome for you to be standing, both of you.

As soon as you get this evidence closed, I propose to go into a series of meetings with you that are somewhat informal and discuss together a lot of things, and one at a [fol. 597-799] time. And out of that we will make some decisions.

I have my law clerks, not one, but two at present, and we will have whatever necessary number we need to keep abreast of the thing for me. But I want to talk with you folks about it as we go.

Now, I am not sure I understand your amendment to your proposal that you made this morning. In the first place, how are you going to get a corporation going that doesn't have any assets?

Mr. Harrison: Well, if your Honor please, as far as the company's being is business is concerned, we will not be able to be in business serving the Northwest market until we have transferred the assets, issued the stock, redeemed the bonds, and obtained the certificate from the Federal Power Commission.

The Court: Yes.

Mr. Harrison: Now, in the meantime, you may have nominal stock issue, but the assets will not be in shape to transfer until we are prepared to proceed under a certificate from the Federal Power Commission and until we have arranged a surrender of the bonds and the issue of the new bonds by permission of the Federal Power Commission.

The Court: I think that this notion of having a corporation set up before we have to decide some of the major questions in this lawsuit has some merit, and the merit, it [fol. 597-800] seems to me, it has is that we have an adversary party here.

Of course, the United States, in a sense, is an adversary party, but, if we had a corporation going—let's call it "New Company"—that had aggressive executive officers and management, board of directors, who had hired legal counsel to come in here and talk about what assets El Paso Natural Gas ought to transfer to that New Company under this divestiture, it seems to me that adversary position of the folks running the New Company and the folks running El Paso would go a long way to disabusing anybody's mind that El Paso was setting up a dummy here for doing anything at all contrary to the purpose and meaning of Sec-

tion 7 of the Clayton Act or the decisions of the Supreme Court of the United States.

I have been thinking about that, as a matter of fact, the last two weeks. Nobody suggested to me, either of you, this idea. I haven't been in communication with any of you, of course. But it seems to me that, if this could be worked out, it would go a long way, as I have said, to disabuse anybody's mind that there is any influence, any subversive influence, or any improper influence, on the part of El Paso.

The difficulty I feel about this—and this is where I am not clear about your proposal—the difficulty I feel about it is: I understand, of course, that promoters can get [fol. 597-801] together and, as promoters, apply for articles of incorporation or a charter, and they can get one. In that, of course, they are going to have to talk about the capitalization, how much stock, and what is it worth, and who owns it. And then you get to the question of what consideration was paid for it. How are you going to get a corporation going that has any real being or any real effect which would be helpful in this proceeding, if they first don't have some assets. The incorporators are simply going to have to tell the Secretary of State about that.

Mr. Harrison: Well, if your Honor please, I see no difficulty in the Court's suggestion that the company be now formed and it be formed with adequate capital to perform its future functions, or to the divesting of the shares of stock as and when they are issued in the Court's trustee, or the naming of the chief executive which was agreed to in Court here. And, once there is a decree which defines what the assets will be that will go to the New Company, then the New Company can proceed upon the assumption that that will be the assets of the New Company, the stock will be issued for those, and they can be, to that extent, in business, very much the same situation as if we were forming a corporation and the Court and I committed ourselves by contract to commit certain assets and properties at a future date. Stock could certainly be issued

[fol. 597-802] against such a commitment, just the same as it could against the decree issued in this case.

The Court: I don't want to issue the decree divesting the assets until we get the adversary party set up so that it can participate.

Mr. Harrison: May I suggest to the Court—

The Court: I don't mean to say that is my purpose or there is any final judgment about it. I am trying to talk it out with you.

Mr. Harrison: My comment at the moment, if your Honor please, is that if we haven't had an adversary in this Court in this proceeding, I have never seen an adversary.

The Court: The Supreme Court is going to say when we get up there with a divestiture that they don't like it. They are going to say, "Judge, we don't like this." And maybe they will say, "We won't send it back to him any more. We will fix it up ourselves."

Mr. Harrison: That is quite possible, your Honor.

The Court: Yes. It certainly is quite possible. They have that power. As a matter of fact, there is no appeal from them.

Mr. Harrison: That is right, your Honor. But, it seems to me—

The Court: What I am trying to get at is some plan that will bring to an end any further litigation about this. [fol. 597-803] There are some very real practical problems.

One is almost nine hundred million dollars' worth of bondholders, security holders.

Now, whatever happens, whoever succeeds to these assets must assume in the neighborhood of a quarter of a billion dollars of that indebtedness, about two hundred forty-five million.

Mr. Harrison: I think the indebtedness is 180, your Honor; 240 was the net worth of the company.

The Court: All right, 180 million. That is a lot of securities and security holders to be holding in the offing here now, not knowing what is going to happen.

They are willing now to go along with a divestiture for—what was it (an eighth of a cent increase in the interest rate?

Well, I think it is a real, practical difficulty as to how long we can keep those people on the hook on that sort of problem.

Mr. Harrison: That is the reason, if your Honor please, that I felt that if we could create New Company, obtain a decree—and I see no escape from the necessity of this Court's defining in this decree what the properties will be that are to be divested upon the evidence and the record made here and the arguments of the adversary parties.

[fol. 597-804] The sooner we have the New Company, the sooner we can proceed to the machinery necessary to redeem the outstanding bonds and to firm up the consents and to obtain the necessary governmental permits and certificates.

On the other hand—and I see no problem at all in creating the company now, in issuing whatever stock—whatever it may be in the form of stock—controlling shares, to the trustee of the Court, to the appointment of an independent management executive in charge of it. But, in the last analysis, I don't see how this Court can avoid passing upon the general form of this decree and the assets to be divested except upon the evidence and the record that has been made before you by the Government and ourselves. And I don't see any practical way of introducing a third party into the proceedings for the purpose of determining what the decree shall be.

The Court: I am not suggesting anybody else except your suggestion that we form up a corporation right away. That was your idea this morning.

[fol. 597-805] Mr. Harrison: Well, I really did not make that specific suggestion. What I suggested to the court was that all of our evidence is certainly in on the questions revolving around what this New Company shall be and what assets shall be defined as the assets to be transferred to

the New Company, and I would hope that the court would rule upon those issues now so that we could promptly proceed to obtain the necessary permits to relieve the debt, to issue the bonds, and apply for the necessary certificate, because certainly we will be in no position to divest the stock to any particular company or to the stockholders or to the public until we have a company in business, and that means after we have carried out these intermediate functions with reference to capitalization, transfers, and the obtaining of the necessary certificate and permit. How long that will take, your Honor, I don't know. Your Honor's guess as to how long the Federal Power Commission will take to perform their function here would be as good as mine, but perhaps I am not amiss in saying that it will not be within the next couple of months.

The Court: Well, it is your notion that if I frame a decree divesting the assets and defining the liabilities—it is your idea that that is an interlocutory decree?

Mr. Harrison: Yes, your Honor, except as to those [fol. 597-806] features which will have been carried into effect and performed. I take it that once—it is an interlocutory decree, because, of course, it calls for further action of the court thereafter.

The Court: What I mean by that is: Do you think that is appealable?

Mr. Harrison: Yes, I think it is, your Honor.

The Court: Well, I think so, too. That is what I am getting at. I would like to get the whole scheme set up in such fashion that this matter is presented on the record, including the decree, in as complete a way as possible and in such a fashion as to show, demonstrate, not beyond any peradventure of a doubt, because there isn't any such thing in legal proceedings, but which has a reasonable likelihood of being sustained.

The No. 1 thing on that is: We have got to take a little time on it. I am not ready this afternoon to give you a divestiture decree, although we have been working on this

since we began. But I don't think it will take me too much longer. However, I may need some more help from you as we go along. I may have to hear from you, and maybe we can spend some time this week looking into some of those things.

As I understand your suggestion this morning, it doesn't very greatly differ from your suggestion in the first place. [fol. 597-807] Mr. Harrison: Well, except that the form of decree which we have in the record and which we have tendered to the United States and to the Court was drafted and prepared in connection with discussions with the Government and in the hope that we would arrive at a complete agreement upon all features of the decree. And this we have not been able to do so far. If we have to call upon the court to decide the issues and we cannot come to any agreement upon any of them, we would like to propose a different form of decree to the court, since it was framed in a different background and under different circumstances.

The Court: Surely.

Mr. Harrison: And if we did, then the only change in substance in the decree which we offered to the court would be that the court would order the creation of the New Company, would order the divestiture of the assets which the court determined should be divested, the making of the contracts, and the direction to maintain the current rates and apply for a certificate to the Federal Power Commission, and would order divestiture of all of the stock of the New Company within a specified period in such a manner and at such time, whether it be by public sale, by sale to a selected purchaser, or bidding between purchasers, or to the shareholders, as the court should hereafter determine [fol. 597-808] in light of further developments.

Otherwise, in substance, the decree would be substantially as we presented it to the court.

Again I say it was developed in the course of this hearing the suggestion that we should create the company even though we were not prepared, pending the issuance of

certain certificates and the obtaining of various agreements and permits, and issue stock, convey it to the court's trustee, and agree upon an executive manager for the New Company.

And I see no reason why those steps can't be taken in any event. And the company is prepared to agree on it.

Now, I still don't see how you can have what everybody calls a viable company, a company that is salable, or whose stock is salable, until you put it in shape to do business, and it isn't in shape to do business until the transfers are consummated, until the debt has been created, until the certificate has been issued. I don't know whether that clarifies my proposal.

The Court: Yes, it does.

All right, Mr. Lipson, do you want to talk to that?

We will take a recess.

(Whereupon a recess was had and then an adjournment taken until Wednesday, January 27, 1964, at ten o'clock a.m.)

[fol. 597-810]

Transcript of Proceedings—January 27, 1965

The Court: I believe where we left off, Mr. Lipson wanted to reply to the adidtional proposal made by Mr. Harrison.

STATEMENT BY MR. LIPSON IN REPLY TO REVISED PROPOSALS SUBMITTED BY MR. HARRISON

Mr. Lipson: Yes, your Honor.

Your Honor, as we understand the defendant has presented a proposal that this court delay its ruling on the matter of distributing stock in the New Company for an indeterminate period of time.

The Court: I don't think it was indeterminate.

Mr. Lipson: Well, under this proposal as we understand it—

The Court: At any rate, not necessarily indeterminate. That is something we can work out, whatever time is involved. What I mean to say by this is that I don't think you can criticize this proposal on the basis that the time is indeterminate. That is something the Judge is going to figure out, and it won't be indeterminate, I assure you.

Mr. Lipson: Under this proposal, as we understand it, the defendant would first have the court determine precisely which of the merged companies assets are to be divested to form New Company.

Next, this court would install management in New Company and presumably this would be done in consultation [fol. 597-811] and with the advice of El Paso and others.

The Court: Well, also you.

Mr. Lipson: Yes, your Honor.

The Court: Yes. This is going to be done right here in the bright sunlight with everybody looking at it.

Mr. Lipson: And possibly after some additional evidence has also been taken on that matter, if it is necessary to do so.

Then New Company, and presumably El Paso, would be required to go through an entire certification proceeding before the Federal Power Commission, as well as any appeals that might be taken therefrom.

As we understand it, only after all these steps were completed would a determination then be made as to the divestiture of New Company's capital stock.

We think that this proposal can only be evaluated in the light of the Supreme Court's mandate under which this court sits. The mandate requires this court to order divestiture without delay.

The Court: We are doing it.

Mr. Lipson: Using a conservative estimate, this new procedure suggested by defendant El Paso could result in a delay of from one to three years.

The Court: What is this?

Mr. Lipson: The procedure suggested by El Paso, going [fol. 597-812] through all the steps I have just enumerated, could, we believe, conservatively result in a delay of one to three years before a divestiture decree regarding the divestiture of New Company's capital stock would issue. The ultimate delay would be even greater before divestiture could be actually effected.

It is the Government's position that the most important feature, the sine qua non, of an effective divestiture is the determination of an independent ownership of New Company. This issue has been the subject of evidence, argument and briefs from the very commencement of these proceedings.

The pre-eminence of this issue has been recognized by counsel for both parties and has been recognized by this court. We believe that there can be no effective divestiture order without a resolution of this issue. And we do not believe that a resolution of the issue should be deferred.

This case really differs from all other Section 7 merger cases requiring divestiture, because here, for the first time, the Supreme Court has itself directed divestiture without delay, and therefore any delay in determining the ownership of New Company in this case, such as has been suggested by defendant, can only delay compliance with the Supreme Court's order.

[fol. 597-813] The Court: No, I don't think so. The Supreme Court sent it back for the district court to frame a decree. If the Supreme Court was that anxious to get that divestiture I guess they would have done it themselves. I don't believe this mandate deprives the court of some discretion in this matter.

Mr. Lipson: That is not our argument, your Honor.

The Court: It is pretty close to it when you say that when they say, "Divest without delay," they mean right away. Now, I don't understand that to be the mandate. I think a judge—I think it should apply to all judges—

should be deliberate enough in arriving at a judgment, a determination, to enable both sides, all of the parties, to inform him about the facts, about the law. And I see in the judicial process, as I look at it—fifteen years' experience here—too much of a tendency to do these things in a hurry.

We are proceeding without delay, but I am also going to proceed with a full comprehension, within the limits of my ability, of what is involved here. If it takes three years, we will take three years. Go ahead.

Mr. Lipson: In addition, your Honor, we would like to note that the object of these proceedings is to set up a successor to the Pacific Northwest Pipeline Corporation to occupy a position from which it can serve the markets formerly served by Pacific Northwest, and in a position [fol. 597-814] from which it can compete with El Paso to serve the California market and other markets as well.

This court's determination of which assets are to be assigned to the successor company, this court's determination of the terms of the contracts under which this successor company will be obligated, and this court's determination of the ownership of New Company are, we believe, indivisible parts of what is essentially a single determination.

The Supreme Court has noted that the key to the whole question of an effective antitrust remedy is the discovery of measures effective to restore competition.

Under El Paso's current proposal the assets that are to be divested would be identified, but it would be impossible to evaluate New Company's competitive status vis-a-vis El Paso itself without also knowing at the same time the identity of the class of persons who will own and control the New Company. Only when all of these factors are considered together can we make any kind of an intelligent determination about New Company's probable competitive position.

An additional point, your Honor, is that, in our view, it is needless to delay the determination of this issue, that is, the issue of the ownership of New Company shares for

the purpose of reaching a decision here. No claim is made [fol. 597-815] by the defendant that it needs additional time to introduce more evidence. The defendant, as well as the Government, has rested, and the record is complete in this regard.

El Paso has made a concrete proposal to distribute New Company shares to the El Paso shareholders, and this proposal is still before the court.

The Government has commented at length on the El Paso proposal and has offered alternative proposals of either a sale to a third party or of a Reading-type distribution.

The submission of precise terms from these prospective third-party purchasers awaits only the pleasure of this court.

Since all the necessary facts relating to this issue are already in the record, or are readily available, and since the law and the facts have been briefed and argued at length by counsel, no further delay is required, we believe. On the other hand, as we see it, there is considerable virtue in determining the ownership of New Company shares before applying to the Federal Power Commission for certification.

This court has already remarked about the desirability of having an adverse party represent New Company's interest. Both in these divestiture proceedings here and [fol. 597-816] in the certification proceedings to be held before the Federal Power Commission the presence of an adverse party, representing a New Company which is independent of El Paso and whose stockholders share no community of interest with their El Paso counterparts, would do much to insure that New Company will emerge as a viable, independent competitor of El Paso.

We cannot safely assume that there will be an arm's length, competitive dealing between El Paso on the one hand and an appointed management of New Company who must be ever mindful of the fact that the shares of New Company, even if trusteed, would be held for the benefit of

El Paso's account for a number of years and thereafter might be owned entirely by El Paso's shareholders.

The effect of such a proposal is that New Company would remain a subsidiary of El Paso for an indeterminate period, and we believe this would not be divestiture.

For these reasons we believe that the defendant's proposal for segmenting the decree in this action and for delaying the resolution of the ownership issue should be rejected.

The Court: Now, before we hear from Mr. Harrison, I want to speak to your statement that the court has already suggested that there ought to be an adverse interest in these proceedings.

[fol. 597-817] What the court was prospecting when I suggested that the other day was the possibility that before any kind of a decree was entered we might have a corporate entity, we might have executive management, we might have attorneys employed by that executive management who would come in here and participate in all phases and aspects of this decree. That is what I was prospecting with you, and that is a far-out kind of an idea, I suspect, because I don't see how you could get a corporate entity set up if the corporate entity doesn't own anything and had no prospect of owning anything that could be depended upon.

Now, that was pointed out after I made that suggestion. Now, that is all I was talking about. I had a notion that if it were possible at this early stage of these proceedings to have the corporation formed and in business, at least to the extent that they had management, board of directors, who could hire a firm of attorneys to come in here and battle it out with you in the interest of the new corporation, it might take us a step away, further away, from the suggestion that El Paso is not only pulling the laboring oar here, but is steering the ship.

Well, I have given up that idea. I don't think that is a practical notion.

Now, you say anything you want to, Mr. Lipson. I don't want in any way to interfere with anyone's presentation [fol. 597-818] in the matter here. We are going to take as much time as you want.

Mr. Lipson: We have stated our reasons for opposing the suggestion made by El Paso's counsel, and we do believe that your Honor's initial reaction to the desirability of establishing an adverse party to represent the New Company's interest is a good one, and we believe that practical methods could be worked out to put that possibility into effect.

The Court: How would you get the corporation set up and going without owning something? How would you get its charter issued?

Mr. Lipson: I am no expert at corporation law, your Honor, but it is my understanding—

The Court: I am no expert in it either, but I would like to know how you can get the Secretary of State to issue a charter to you when all the promoter says is, "We haven't a dime. If the judge sees fit to divest this thing somehow or another, maybe we will get it and maybe we won't." Maybe one of the three purchasers that you have suggested here may get it.

But we do not need to argue that. I have never seen any sense in arguing a fact. All we have to do is make a phone call. Nor any sense in arguing about the law. It is all in the books if we look in them.

Mr. Lipson: It is my understanding that a corporation [fol. 597-819] could be set up in that regard.

The Court: If you fellows think this is a possibility, why don't you give me a memorandum on it. If you think there is a scheme that we can work out along the line the court suggested—you see, my idea is way far out beyond Mr. Harrison's suggestion, way far out. My notion was to organize a corporation before the court did anything here except to set up that corporate entity and provide some management, employ some attorneys.

Mr. Harrison's idea is midway between that and a complete and full scheme of divestiture in a decree which goes the whole way and works it out in ultimate detail.

Well, I will hear from Mr. Harrison.

Mr. Lipson: Yes, your Honor. I would just like to remark that I believe a corporate charter could be secured in this way.

The Court: Why don't you give me some law on that.

Mr. Lipson: I would be glad to, your Honor.

The Court: You may be entirely right.

STATEMENT BY MR. HARRISON

Mr. Harrison: To begin with, if your Honor please, the parties to this suit are the United States, the plaintiff, and El Paso Natural Gas Company, the defendant. The charge of the United States was that the defendant had violated Section 7 of the Clayton Act. The Supreme Court upheld that contention of the Government, and it was sent [fol. 597-820] back to this court to frame a decree, after hearing from both parties and hearing the evidence and argument, for the purpose of restoring the competition which existed when Pacific Northwest was acquired. And the only issue before this court is what form of decree will accomplish that purpose.

Now, I do not understand why the Attorney General would suggest that it is not prepared to properly represent the interests of the United States in that respect and that it needs the creation of some third party to come in here to act in a manner adversary to El Paso. I have said before, and I repeat, that I couldn't possibly think of any more adversary opponent than Mr. Lipson upon every single detail of every proposal that El Paso has made. Does the Attorney General confess that it is not prepared to represent the United States in framing a decree?

The Court: Excuse me a minute. They have the blind up back there and I can't see. There is a reflection from the top of that metal thing. Will you pull that down, Mar-

shal. Better pull the other one down, too. There is another one over here.

Mr. Harrison: To me it is an extraordinary thing for the Attorney General to appear before this court and confess its inadequacy to represent the United States in the framing of a decree which is governed solely by antitrust law.

[fol. 597-821] I think, if your Honor please, we should not be led astray by some representation made in connection with petitions to intervene. The issues before this court are not whether Oregon's interest will be better served as against California's or California's ultimate interest with respect to service or reserves better served than Southwest's, or that Wyoming have an advantage out of this decree over Idaho. Those are all questions which go to the competitive interests of various markets and regions and buyers and distributors. Those are not matters which are before this court.

I would assume that if a New Company were now created and were to replace or assist the Government in opposing the interests of El Paso, they would seek to persuade this court that the New Company and the new management and new ownership should have all of the assets of El Paso's that they can lay their hands on. They would like to get everything El Paso has and, if not all of it, any part of it that they can get. Perfectly natural. But that has nothing to do with a decree in a Section 7 Clayton Act case in which the purpose of the decree is to serve the interests of the United States under the antitrust laws of the United States and the purpose of the decree is to correct the situation which resulted in a decree against the defendant.

Now, what is the competitive situation that existed at [fol. 597-822] the time this stock was acquired? All of this evidence is in the record. It is all before the court. The court is perfectly familiar with it. The evidence is that we had a Pacific Northwest Pipeline Company that didn't have funds sufficient to meet the costs necessary to develop

the reserves and leasehold interests that had been transferred to it by the Phillips Petroleum Company, and it wouldn't have been able to carry out its obligations in that respect if it had not been for an exchange-of-gas agreement with El Paso. It was not able, even after acquisition, to meet the first dividend on its preferred stock. It had to resort again to El Paso's assets for that purpose.

Admittedly—and by the way, talking about this ratio of capitalization, Pacific Northwest didn't have anywhere near as much equity as the New Company we are now creating.

The testimony is unquestioned that it was in difficult financial circumstances, and this was never questioned up until this time by the Attorney General in the trial before this court or by the Solicitor General before the Supreme Court.

And what are we offering, having had all that we could possibly offer enticed from us in the course of discussions in which we had every reason to expect we could obtain a stipulated judgment? They squeezed out of us about every-[fol. 597-823] thing we could offer, not merely what would replace the weak and feebly capitalized Northwest, but a healthy, strong, viable company, vested not only with the assets that we acquired, but with all of the assets north of a certain point, and including assets acquired at the expense and at the cost of El Paso in Canada and in the Rocky Mountains, as well as betterments, extensions, and other facilities, including a gasoline plant in which Pacific Northwest never had the slightest interest and which it could never have built in its then financial position. And still counsel says, having enticed the company to offer all it could offer in the hope of an agreement, "We want all that, and we want some more. We want to strip it of some additional reserves that are not even usable in the Northwest."

The only purpose we can see: to injure El Paso and not to help the New Company, strip it of assets acquired by its own capital, its own investment, and own funds, which

we believe and confidentially assert would be unconstitutional, deprivation of property.

The attitude seems to be not to recreate a situation comparable to that which was led by Mr. Fish up to 1937, but to create a situation destructive to El Paso.

When El Paso goes so far as to offer to the New Company reserves in large amounts acquired, of course, by El Paso fully as adequate to support its own market com-[fol. 597-824] mitments as the reserves of El Paso itself to serve its market commitments, it says, "No. We wish to strip you of additional reserves, not to help the New Company, but to impair the ability of El Paso to serve its markets under its existing commitments."

And so they want another adversary party to pursue this problem further. And another adversary party would have no function in sitting in this case to advise this court concerning the proper administration of the antitrust laws of the United States. That is the function and duty of the Attorney General.

It is amazing to learn today that it is willing to abdicate that function to a third party.

Now, this matter of delay. I think the record here speaks eloquently on the subject of delay, a delay of six months while there was before the Attorney General for consideration a fully developed plan for divestiture, for its consideration, with repeated statements in this court and on this record that El Paso was working in good faith, looking to a plan for divestiture that would be acceptable to the United States. And the United States stood before this court more than once and said, "We agree that El Paso is acting in good faith, but we are not ready to state to this court our final position with respect thereto, because we are wholly ignorant of conditions in the gas industry [fol. 597-825] and, since this is a very complicated problem, we must investigate the gas industry and learn about it."

They asked for substantial delays, which were cut down by this court in an effort to move this proceeding along,

and it wasn't until November 27 that suddenly we were confronted with the statement that the United States opposed the plan of divestiture in totality, in every respect. And from then on until this present moment the Government has devoted its entire effort to opposing every single detail of this plan of divestiture which was before it for six months, and while it represented to this court that there was reasonable ground for believing we could agree.

And why did we make such a generous offer, if we might call it that? It was not so generous when you consider that the New Company would be the property of El Paso and when you consider that one of the details or conditions of the plan was that it would be distributed to its own stockholders.

Otherwise, may it please the Court, we would not have been induced to present the kind of a plan of divestiture that we have proposed to this court. We would instead have proposed a plan which fairly substituted in the Northwest the Fish competition of that period.

And you will recall that the Supreme Court makes no [fol. 597-826] contention with respect to the financial capability, no finding on that subject, of the Pacific Northwest Pipeline Corporation.

It enumerated the respects in which it could compete. It stated that it had proximity to the California market. It stated that it had energetic and zealous management. It stated that it had access to Canada where it could obtain supplies. And it said the mere existence of that company, not its success in competing, meant that it was a threat to compete in the future, down the years ahead, for future demands of gas in the California market.

Does counsel sincerely, honestly contend that this company which would be created under the plan of divestiture is not vastly better qualified to compete in any market than the Pacific Northwest was when it was acquired? I doubt whether counsel can take that position and defend it and do so honestly.

Now, as a matter of delay—we have suggested the amended plan because we wish to avoid delay. We wish to see the New Company created, and we wish to see it created in accordance with a decree of this court and upon that foundation. We wish to be free to proceed without delay to firm up the commitments of 800 million dollars of debtors of El Paso and procure the necessary releases, and prepare for the issuance of the necessary substitute bond issues. [fol. 597-827] We wish to proceed without delay before the Federal Power Commission. And I might say that at other times and out of another corner of its mouth counsel for the Government has asked this court to submit this matter at the earliest possible moment to the Federal Power Commission so that it may act upon certain of the matters involved in this case.

Until we are able to transfer these shares—until we are able to issue the stock, rather, in exchange for the properties, until we can rearrange the debt, until we can get the certificate of the Federal Power Commission to do business on the part of the New Company in the Northwest, we have nothing to sell to any favored buyer of counsel for the United States.

Would counsel for the United States suggest that today we sell a New Company which doesn't exist to somebody who is willing to buy it? He may criticize our plan of divestiture, but who is drooling at the mouth to buy this plan he criticizes? What could we sell the man? What could we sell the public? What could we sell anybody? Nothing. And so we say to the court, Can we not get along with this thing? Can we not get this New Company created? Can't we stop delaying all of these proceedings by arguing about these matters and get this company on the road and get a certificate?

Now, what is the problem? First the management of [fol. 597-828] the company—well, I withdraw that. Counsel has said that the court would be deferring a decree of divestiture. We did not propose that the court do any such

thing. We propose to the court now to create divestiture of all of the shares of the New Company by El Paso within a specified period of time. That is the decree of divestiture.

Now, as to how that decree will be implemented, as to how ultimately and finally the stock will be distributed, whether to the public or to one of the favored buyers of the Government or to the stockholders is something that need not be decided today, and I suggest to your Honor that this record is still open for evidence and, as matters develop, we may have more evidence upon that question to assist your Honor in determining that issue. Why should it have to be decided this morning when nothing can be done about it this morning? Why should it be decided next month when nothing can be done about it next month?

I suggest to your Honor that when we know a little more about what the Federal Power Commission is prepared to do and to authorize, we are in a much better position for this court to make a determination of the procedures for divestiture under a decree of divestiture already entered.

What we are seeking then is to expedite this matter. We are seeking to have the delays, which I attribute directly at the door of the Attorney General, discontinued. I sug- [fol. 597-829] gest that no delay can be attributed to El Paso Natural Gas Company.

Now, as to whether we should concern ourselves this morning with management in the interim is another matter. I suggest, your Honor, that your Honor has ample power and, with the assistance of the parties, should have no problem in providing independent, competent management for the New Company in the period between its formation and the ultimate disposition of the stock under the decree of this court. Once it is disposed of the manner of disposition thereafter will ultimately determine the management. I see no problems. I see only an opportunity to discontinue delay.

Mr. Lipson: Your Honor, I would like to note that the Government stands on its position, as previously stated

to you this morning. I would just like to remark that it seems quite unusual that it would be appropriate, in El Paso's view, to determine the ownership of New Company's shares if we adopt the El Paso plan, but it is not appropriate for this court to do so if we do not adopt the El Paso plan and adopt some other plan.

I think that Mr. Harrison is perhaps—

The Court: Well, the only place where you are apart so far as who gets the stock of the New Company is whether it should be spun off or we have a decree like the Reading [fol. 597-830] decree or we sell it out of hand to some purchaser that you may find. I say that is the only place we are apart on that subject. And, of course, you are apart on some of the aspects that you claim ought to be disgorged, which El Paso says ought not to be. But the main difference between you concerns who is going to own that New Company. That is what this argument this morning is all about. And you want that question determined right away and not deferred at all. You want this decree to be a one-package decree, decide all the questions, settle all the questions, including who shall own that company.

Now, it is perfectly clear, it seems to me, that nobody contends that the divestiture should require El Paso to transfer physical assets. I don't think that is a possibility. I think the only way you can divest is to create a company and set them up in business and then direct El Paso to make whatever transfers are necessary to put them in business.

I don't think we can talk about ordering El Paso to turn over a pipeline, for instance, between the San Juan Basin and the Pacific Northwest, turn over that pipeline they got from Pacific Northwest. They got a pipeline. I don't know enough about the gas pipeline business to know what goes with it, but I imagine there are a lot of other things go with it besides the pipeline. We are not going to decree the [fol. 597-831] transfer of things like that in any detail.

Why wouldn't it be a good notion to get what I think are subsidiary questions out of the picture? Why don't we settle the San Juan Basin reserve question? Why don't

we settle the loss carryover question? Why don't we settle the questions about various other things up in the Northwest that we have questions about, that gasoline plant, and the rest? Why not take those up one at a time and get them out of the way? That seems to me to be an orderly way to do it. And then we tackle the major problem when we are in a whole lot better position to know what we are doing.

When you get that company set up and you get these assets divested from El Paso and invested in the New Company, the El Paso management is going to have to have a second look at what they have left and what are they going to do with it and what are their capitalization problems, what are their debt funding problems. And it may very well come to pass that they won't want to spin that stock off, certainly not in totality. Maybe they will have an entirely different notion about that, much nearer to the notions you have.

You know, we have a tendency, we lawyers, when we get to talking about a thing like this, to overlook the very complex and difficult problems of management, corporate management, big business management—and this is big business—and we have a little tendency, some of us, to [fol. 597-832] fancy that we can tell big business how they ought to run it. Now, I just don't think that we can at all. I am certainly not going to venture to say that I am a natural gas company expert or a pipeline company expert.

The way we are going to have to proceed: You fellows are going to have to educate me. And that is what we are in the process of doing.

Now, I have already requested a memorandum from both of you on the subject of Mr. Harrison's addition or amendment to the proposal. I wish you would get that in just as soon as you can.

I would like to see whether there is any authority for or against it. If there isn't, that is not appalling at all. We can work something out. But whatever there is I would like to be able to put in the opinion.

REQUEST BY COURT FOR A MEMORANDUM ON CONDITION OF PACIFIC NORTHWEST AT TIME OF MERGERS

I would like a memorandum also from both of you on just exactly what condition was Pacific Northwest in at the time of these mergers, and I want the references to the record on that. Now, you have already supplied me excerpts from the record, copies of the record. I would like that written up in the form of a memorandum so that you pull it together and elaborate upon the relationship of the factual data, one bit to the other.

(Recess had.)

[fol. 597-833] Mr. Sabin: Your Honor, I would like to bring a matter to the court's attention.

The Court: I would be happy to have you do so. By the way, I will bring something to your attention. I have been meaning to. I got out some form orders denying—about 20 of them, 23 or 4—denying all the petitions to intervene, applications, and motions, and also the motions to appear as amicus curiae, and those orders were signed and filed on the 22nd, and they are in the clerk's office. I also filed Mr. Daggett's memorandum, which I adopted, not in its entirety, but very nearly, and I have had copies made of that. I suppose you have already had a copy, but there are twenty-five copies of that out in the clerk's office.

And, Mr. Brennan, I think I haven't heretofore said so, but I wish the clerks would notice all those proposed interveners and the rest and send a copy of that memorandum along to them. We didn't have copies made of the orders. I have signed an individual order in each case. It isn't a blanket order covering you all. It is an order addressed to each one of you.

COUNSEL FOR STATE OF OREGON STATED A NOTICE OF APPEAL HAD BEEN FILED AND AN APPLICATION FOR A STAY WHICH COURT SAID WOULD BE DENIED

Mr. Sabin: I wanted to bring to the court's attention that the State of Oregon has filed a notice of appeal, and this morning I filed with the clerk an application for a stay, and I request that the court fix an amount for a [fol. 597-834] supersedeas bond. I want to bring that up now in order to do it in open court.

The Court: Of course, I am going to deny your application for a stay. And will you folks on the other side prepare a formal written order to that effect so it will be in the file.

As far as the supersedeas bond is concerned, I will hear you both on that right now.

Mr. Harrison: Us, your Honor?

The Court: Yes.

Mr. Harrison: If your Honor please, I don't understand that counsel is a party to this proceeding, and I take it he is seeking to stay a proceeding involving the framing of a decree in pursuance of a directive and mandate of the Supreme Court, and parties in interest before this court do not include counsel. He is asking you to stay our proceeding.

The Court: I am not going to do that. You don't need to worry about that.

Mr. Harrison: I don't understand the purpose of a supersedeas, then, your Honor, a supersedeas bond. It has no purpose except to indemnify the Government and ourselves, I guess, against the ill effects of that stay.

The Court: Of course. What do you say to that?

Mr. Sabin: That is entirely correct, your Honor. As I [fol. 597-835] understand it, the purpose of the bond is to indemnify—

The Court: We won't need to bother about that. You do as you please. We will try to help you out in any way we can. I got those formal orders out there so there would

be no doubt about when the thing was formalized, but I think on the Eighth day of December I said that all right here in open court. Somebody wanted me to make a ruling, so I gave them one.

Now, I have a suggestion or two before we go any further this morning. I wish, Mr. Harrison, you folks would hand me your new proposed divestiture decree embracing your additional suggestion, your amended idea about the matter.

Mr. Harrison: Yes, your Honor.

Discussion on Order in Which Various Topics Are to Be Considered

The Court: And, secondly, I want to discuss with you the order in which the various phases of this matter now should be brought on for consideration here, for further discussion. I am going to dispose of them one at a time, and I want to do that. We have been studying them, and I want to sit here with you and discuss it and have you present any additional material you want with respect to it. The record is open, as far as I am concerned. You can produce any evidence, either side that wants to. Assuming I go along with you, or if I don't, I would like to discuss with you—and we will do that today—the order in which the various topics under consideration here will be [fol. 597-836] discussed. And I am particularly interested in having you talk to me about when and at what stage we should discuss the chief executive officer. Also—excuse me one further minute. Well, I think I will let it stand there.

Go ahead.

Mr. Harrison: If your Honor please, we have a brief bit of testimony of Mr. Boyd's which relates to a matter which I think is not necessarily before the court. At least, we didn't think it was until some testimony given the other day. But we think it would be helpful to put in the record Mr. Boyd's testimony concerning the effect of any attempt

to sell assets, and I would like to recall him for that purpose.

The Court: Well, now, there is a problem about that, it seems to me. It isn't the court's problem at all. It isn't a problem in this proceeding. But it seems to me that that might be a problem for El Paso at this juncture. And this was discussed in chambers yesterday. You gentlemen know, don't you, Mr. Lipson, and Mr. Williams, what we are talking about?

Mr. Lipson: Yes, your Honor.

The Court: Now, I suggested yesterday that it may not be necessary to put that evidence in.

Mr. Harrison: Very well, your Honor.

The Court: Certainly not at this juncture. And I hesi- [fol. 597-837] tate to have that material publicized. Of course, anything that happens in here is public property. What I suggested yesterday was that you might hand me a memorandum about it to aid the court, and at some juncture in the proceeding which is closer to a time when these things are brought to a definitive state, if you want to complete the record on that, you can do it.

Mr. Harrison: If your Honor please, may I suggest—

The Court: That would have to be stipulated to by both parties, because I am not going to look at anything that is outside the record unless the parties agree to it.

Mr. Harrison: I am sure we will have no problem.

The Court: I don't think you ought to put Mr. Boyd on now.

Mr. Harrison: Very well. May I suggest, in the first place, if your Honor please, in behalf of El Paso, we are prepared to suggest right now that the first issue to be considered by the court be the proposal by the Government that certain gas reserves, in addition to those proposed in the plan of divestiture, be transferred to the New Company.

The Court: Those additional gas reserves are the San Juan Basin reserves?

Mr. Harrison: Yes, your Honor.

The Court: All right.

Mr. Harrison: The next thing I would like to suggest [fol. 597-838] to the court is this. If it is agreeable to the court, we now have three of four memoranda to prepare, including the revised proposed decree embodying the alternative approach. I would like to ask that we have the next two days to work on those and present them to the court Monday morning.

The Court: Well, I anticipated you might need some time. Do you think you can handle that in two days? I don't want to put any pressure on you at all about it, but of course we want to move this along.

Mr. Harrison: I think we can, your Honor.

The Court: How about you folks on the other side? How is your time?

Mr. Lipson: We will try to do it by Monday morning, your Honor. Because of the fact that we don't have our facilities immediately available to us, we may have to take a little longer than normally, but we will make the effort.

The Court: I wonder—

Mr. Harrison: I suggest Wednesday then, if your Honor please.

The Court: I wonder if you—there is a mighty good library up at the University Law School and, if you people want me to, I can certainly open that wide open for you. You don't need to worry about law books. The Attorney's Office over here—

[fol. 597-839] Mr. Harrison: Frankly, I think we could work faster by taking an hour's ride home than working here.

The Court: Go home?

Mr. Harrison: Yes, your Honor.

The Court: Well, I don't care how you do it. It is the end result that I am going to be interested in, and I don't want to put you under any time limitations that will prevent you from giving me the help I want.

Mr. Harrison: If it would suit counsel better, I would suggest next Wednesday.

Mr. Lipson: That is perfectly acceptable to counsel for the Government.

The Court: All right, we will do that next Wednesday then. Now, then, what do you think about the order of business, Mr. Lipson?

Mr. Lipson: I agree with counsel for El Paso that the first topic would be the gas reserve question.

The Court: All right. Then what next?

Mr. Harrison: I would suggest we take them in the order otherwise in which they appear in the plan of divestiture.

The Court: Is that satisfactory with you, Mr. Lipson?

Mr. Lipson: Yes, it would be, your Honor. I am sure we could consult with counsel and work up a table. There [fol. 597-840] are only five or six items altogether.

Mr. Harrison: That is right. I think five actually.

Mr. Lipson: Five.

The Court: Now, in addition to the choice of the Chief executive officer of New Company, we will have the problem of the choice of a trustee, and I want that on your agenda. And I will want you to tell me at what stage you want to discuss that.

Mr. Harrison: If it will assist—

The Court: Why don't you both—we do not need to answer this today. Why don't both of you consider these things and let me know Wednesday.

Mr. Harrison: Very well.

The Court: When you come back here. As a matter of fact, I suppose the first thing we are going to be talking about, should talk about, is your new proposal in that decree.

Mr. Harrison: Yes, your Honor.

The Court: Wouldn't you suppose that would be the first thing to get at?

Mr. Harrison: I think not, your Honor, because I think the form of the decree will probably depend upon your Honor's subsequent rulings. However, I don't know. Per-

haps we can prepare a memorandum on that, too, and submit [fol. 597-841] it along with our proposal.

The Court: I have no choice in the matter at all. I would like to accommodate you gentlemen in whatever desires you may have about that.

Well, it sounds to me as though we have arrived at a good time to recess until next Wednesday. Is there anything further you want to discuss with me today?

Very well.

(Whereupon a recess was taken until Wednesday, February 3, 1965, at 10:00 a.m.)

[fol. 598]

IN UNITED STATES DISTRICT COURT

Judge Ritter

C 143-57.

[Title omitted]

MINUTES OF JANUARY 25, 1965

This matter came on before the court at 10:00 a.m. for further hearing. Jack L. Lipson, Esq., Larry L. Williams, Esq., Department of Justice; William T. Thurman, Esq., United States Attorney, appeared for the government. Gregory A. Harrison, Esq., Robert S. Daggett, Esq., Atherton Phleger, Esq., represented the defendants.

Mr. Harrison addressed the court and made suggestions as to continued procedure. He suggested that a new company be formed in order that there would be a legal entity to complete divestiture in approximately three (3) years.

Mr. Boyd was recalled to the stand and was questioned by Mr. Harrison.

Peter King, Jr., was called by the plaintiff, and was sworn and testified.

Mr. Lipson made a proffer of proof relative to negotiations attempted by the Colorado Interstate Gas Company to purchase the lines of "new company".

Plaintiff's exhibit No. 20 was marked and offered. Plaintiff's exhibit No. 21 was marked, offered, and rejected. Plaintiff's exhibit No. 22 was marked, offered and received.

The hour of noon having arrived, court recessed until 2:00 P.M.

At 2:00 P.M. court reconvened with counsel present as heretofore listed.

Mr. Harrison made statements to the court. Defendant's exhibit R was offered and the government withdrew its previous objection thereto and same was received. Plaintiff's exhibit No. 21 was re-offered and, there being no objection thereto, was received.

O. L. Carson was called by the plaintiff and was sworn and testified.

Plaintiff's exhibit No. 23 was marked, offered, and received.

Roger L. Conkling was called by the plaintiff and was sworn and testified.

Counsel for both plaintiff and defendant indicated to the court that their evidence was submitted, with the exception of two documents to be brought forth by the defendant.

The matter was continued to January 27, 1965, at 10:00 A.M.

[fol. 599]

JANUARY 27, 1965

This matter came on before the court at 10:00 a.m. for further hearing. Counsel present as heretofore listed.

Mr. Lipson made statements in reply to the revised proposals submitted by Mr. Harrison relative to the stock assets and the management of the new company.

Mr. Harrison addressed the court.

The court requested a memorandum from each counsel as to the financial condition of Pacific Northwest Pipeline Company at the time El Paso acquired Pacific Northwest.

Richard Sabin, Esq., addressed the court and requested a stay of execution pending the appeal of the intervenors. Court advised that the request for the stay was denied.

Counsel requested that counsel suggest the order in which the various topics should be brought before the court and discussed, it being agreed that the first question to be submitted would be the "gas reserves" and on the line of the items of divestiture set forth in defendant's Exhibit A, also the question of selection of a trustee should be brought before the court.

Court adjourned until Wednesday, February 3, 1965, at 10:00 A.M.

[fol. 600]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

DESIGNATION BY APPELLEE EL PASO NATURAL GAS COMPANY OF ADDITIONAL PORTIONS OF RECORD TO BE INCLUDED IN RECORD ON APPEAL—Filed January 27, 1965

To: The Clerk of the United States District Court for the District of Utah, Central Division:

In preparing the transcript of record in the above entitled cause on the appeal of The State of California taken January 8, 1965, please include in the transcript all portions of the record in the cause not designated in said Appellant's Notice of Appeal, together with this cross-designation and proof of service thereof.

Brobeck, Phleger & Harrison, Gregory A. Harrison, Atherton Phleger, Robert S. Daggett, 111 Sutter Street, San Francisco, California;

[File endorsement omitted]

Van Cott, Bagley, Cornwall & McCarthy, Dennis McCarthy, Suite 300, 141 East First South, Salt Lake City, Utah, By: Robert S. Daggett;

Attorneys for Appellee, El Paso Natural Gas Company.

[fol. 601] Proof of Service (omitted in printing).

[fol. 603]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

APPLICATION FOR STAY—Filed January 27, 1965

Comes now the State of Oregon ex rel. Public Utility Commissioner of Oregon, appellants herein, having appealed to the Supreme Court of the United States from the final judgment and decree in this cause entered on January 22, 1965, do hereby pray that all further proceedings herein be stayed in all respects pending final disposition of said appeal and that an order be made with respect to the bond to be given for such stay.

Respectfully submitted,

Robert Y. Thornton, Attorney General of Oregon, Richard W. Sabin, Assistant Attorney General of Oregon, Of Attorneys for the State of Oregon, ex rel. Public Utility Commissioner of Oregon.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 604]

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

SALT LAKE CITY, UTAH

January 28, 1965

NOTICE FOR ADDITIONAL HEARING—February 3, 1965

To:

Jack Louis Lipson, Esq., Dept. of Justice, Washington, D. C.

William T. Thurman, Esq., U. S. Attorney, 200 Post Office & Courthouse Bldg., SLC

Van Cott, Bagley, Cornwall and McCarthy, 141 East 1st South, Suite 300, SLC

Arthur H. Dean, Esq., Sullivan and Cromwell, 48 Wall Street, N. Y.

Gregory A. Harrison, Esq., Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco, California

Ray, Quinney and Nebeker, Suite 300, 65 South Main, SLC

Leon M. Payne, Esq., 2200 Gulf Bldg., Houston, 2, Texas

Re: C 143-57

UNITED STATES OF AMERICA,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

Take Notice, that the above-entitled case has been set for Additional Hearing at Salt Lake City, Utah on Wednesday February 3, 1965 at 10:00 A. M. before Honorable Willis W. Ritter.

Andrew John Brennan, Clerk, By: Hana Shuata, Deputy Clerk.

[fol. 605]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

ORDER DENYING STAY OF PROCEEDINGS—January 29, 1965

The Application made and filed January 27, 1965, by the State of Oregon ex rel. Public Utility Commissioner of Oregon for a stay of proceedings in the above-entitled cause is denied.

Willis W. Ritter, United States District Judge.

[File endorsement omitted]

[fol. 606]

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

SALT LAKE CITY, UTAH

January 29, 1965

NOTICE (RULE 77(d)) TO COUNSEL OF RECORD
RE ORDER DENYING STAY, ETC.

To:

William T. Thurman, Esq., U. S. Attorney, 200 Post Office & Courthouse Bldg., SLC

Jack Louis Lipson, Esq., Dept. of Justice, Washington, D. C.

Van Cott, Bagley, Cornwall and McCarthy, 141 East 1st South, Suite 300, SLC

Arthur H. Dean, Esq., Sullivan & Cromwell, 48 Wall Street, N. Y.

Gregory A. Harrison, Esq., Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco

Ray, Quinney and Nebeker, Suite 300, 65 South Main, SLC
Leon M. Payne, Esq., 2200 Gulf Bldg., Houston, 2, Texas
Richard W. Sabin, Esq., Asst. Attorney General, State of Oregon, Public Utilities Commission, Salem, Oregon (97310)
Pugsley, Hayes, Rampton and Watkiss, El Paso Natural Gas Bldg., SLC

Re: C 143-57

UNITED STATES OF AMERICA,

vs.

EL PASO NATURAL GAS CORP., ET AL.

Take Notice, in accordance with Rule 77 (d) of the Federal Rules of Civil Procedure, you are hereby notified that:

ORDER DENYING STAY OF PROCEEDINGS as filed by the State of Oregon ex rel. Public Utility Commissioner of Oregon

was signed by Honorable Willis W. Ritter on the 29th day of January, 1965, and entered in the Docket as of the 29th day of January, 1965.

Andrew John Brennan, Clerk, By: Hana Shuata, Deputy Clerk.

[fol. 607]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

DESIGNATION BY APPELLEE EL PASO NATURAL GAS COMPANY OF ADDITIONAL PORTIONS OF RECORD TO BE INCLUDED IN RECORD ON APPEAL—Filed February 1, 1965

To: The Clerk of the United States District Court for the District of Utah, Central Division:

In preparing the transcript of record in the above entitled cause on the appeal of The State of Oregon, ex rel. Public Utility Commissioner of Oregon, taken January 15, 1965, please include in the transcript all portions of the record in the cause not designated in said Appellant's Notice of Appeal, together with this cross-designation and proof of service thereof.

Brobeck, Phleger & Harrison, Gregory A. Harrison, Atherton Phleger, Robert S. Daggett;
Vancott, Bagley, Cornwall & McCarthy, Dennis McCarthy, Suite 300, 151 East First South, Salt Lake City, Utah, By: Dennis McCarthy;
Attorneys for Appellee, El Paso Natural Gas Company.

[fol. 608] Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 609-842]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

C 143-57

UNITED STATES OF AMERICA, Plaintiff,

—v.—

EL PASO NATURAL GAS COMPANY, Defendants.

Salt Lake City, Utah

Before: The Honorable Willis W. Ritter, Chief Judge.

Transcript of Proceedings—February 3, 1965

APPEARANCES:

For the Plaintiff:

Lawrence F. Noble, Esq., Jack L. Lipson, Esq., Antitrust Division, Department of Justice, Washington, D. C.

William T. Thurman, Esq., U. S. Attorney, 200 Courthouse & P. O. Bldg., Salt Lake City, Utah.

For defendant El Paso:

Gregory A. Harrison, Esq., Robert S. Daggett, Esq., Atherton Phleger, Esq., Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco, California.

[fol. 609-843]
Applicants for Intervention:

Southern California Gas Company, and Southern Counties Gas Company of California:

Roger J. Nichols, Esq., 810 South Flower St., Los Angeles, California.

State of Oregon:

Richard W. Sabin, Esq., Asst. Attorney General, Public Service Bldg., Salem, Oregon.

Paradox Production:

Brigham E. Roberts, Esq., Judge Building, Salt Lake City, Utah.

Also Present:

Paul B. Cannon, Esq., 920 Continental Bank Bldg., Salt Lake City, Utah, Representing Pacific Western Pipeline Corp.

[fol. 609-844] February 3, 1965

The Court: All right, you may proceed.

SUBMISSION TO COURT BY MR. HARRISON A PROPOSED DECREE AND A MEMORANDUM WITH RESPECT TO THE LAW, ETC.

Mr. Harrison: Among other things, may it please the Court, at the last hearing the court requested the defendant to prepare and present in due form a proposed decree which would be in conformity with the most recent suggestions made in behalf of El Paso, and we now submit to the court such a proposed decree. And at the same time we were requested to file a legal memorandum with respect to the law insofar as it may or may not support the form of decree which defendant proposes, and we now submit

that memorandum to the court. Copies have been delivered to counsel.

Briefly summarizing the form of the decree and its differences from the decree heretofore proposed, I would like to point out to the court that it follows the form of decree insofar as certain definitions are concerned, insofar as the finding that the acquisition is in violation of Section 7 of the Clayton Act, the formal language that is binding upon the parties and their subsidiary successors and assigns, officers and employees.

It then continues in Paragraph 4 with a finding that to commence effectuating the plan contained in the decree El Paso is directed to follow certain procedure and take certain steps.

First, "It shall promptly organize and create a corpo- [fol. 609-845] ration, hereinafter called 'New Company.'" We would expect in that respect, if the Court pleases, to form a company with qualifying shares so that the company could have corporate existence, even though we would have no operating assets with which to give service in the Northwest pending further proceedings. And "As soon as practicable, after notice and approval of the Court, New Company shall employ a person well qualified in the management of a natural gas company to serve as chief executive officer. New Company shall immediately submit to the jurisdiction of the Court and be bound by the decree."

Then to proceed: Second, to direct the filing of an application on behalf of the New Company with the Federal Power Commission at the earliest practicable time looking to the issuance of the necessary authority and certificates to enable the shares to be issued and properties transferred and the New Company to serve its Northwest markets.

It then provides that upon securing the certificates the property shall be transferred, the company shall then issue its shares, and shall redeem the bonds in accordance with the plan which has heretofore been submitted by the court dividing the debt between El Paso and the New Company.

The decree then provides for unconditional and complete divestiture in Paragraph D on Page 3, "Within three years after the transfer of the properties and assets to New [fol. 609-846] Company as herein provided, El Paso shall completely divest itself of all of its legal and equitable right, title and interest in and to said shares of stock of New Company in such manner and method as this Court shall, after further hearing, direct."

It then provides divestiture by El Paso of its shares of stock in the Westcoast Transmission Company as was contained in the form of decree.

In Paragraph 5 it provides that "All shares of stock of New Company—" and that means, if your Honor please, not only qualifying shares but any shares which may hereafter be issued in consideration of the property transfers contemplated by the decree, "—shall be immediately transferred to a trustee first approved by this Court, with El Paso's irrevocable instructions to such trustee to exercise all voting rights with respect to said shares in accordance with the provisions of this Decree, subject only to such instructions as this Court may issue after first hearing the Plaintiff and the Defendants. The shares of stock in New Company shall be released by the trustee only in accordance with divestiture by El Paso of all of its legal and equitable interest pursuant to Paragraph IV (D) of this Decree.

There then follow certain injunctive provisions which were contained in the form of decree, for example, prohibiting El Paso from acquiring any capital stock or finan- [fol. 609-847] cial interest in New Company or any assets prohibiting for ten years after the date of entry of this decree the acquisition or holding of any natural gas transmission properties in the United States, or any of the capital stock thereof or of any person engaged in such a business in the United States, certain references to limitations upon the activities of the employees, retirement income plan, and with respect to the owners of more than one-half of one per cent of the capital stock of El Paso.

In Paragraph VII we have the provision proposed by the Government in our discussions with them which look to the surveillance by the Government of the activities of El Paso to assure itself of compliance with the decree.

Now, the essence of this decree, as we propose it to the Court, is this: that having pursued proceedings before this Court, discussions and conferences with the Department of Justice, discussions and conferences with the owners of outstanding secured obligations of the company and other debtors, creditors, we find ourselves still at the end of some eight months with no progress in proceeding with the formation of a New Company, with the creation of a corporate entity with properties that can be disposed of, with any stock to transfer, sell or dispose of, and we feel that the most expeditious manner in which to proceed with this whole case is to decide those questions which will clear [fol. 609-848] away the obstacles to proceeding with the New Company's application to do business, acquire the properties, issue its stock, and be in a position then to have this court, if the parties cannot agree upon the exact procedures and the steps and methods by which the stock shall ultimately be divested, bearing in mind at all times that the court has made a final decree of divestiture ordering a complete divestiture of all of the title, legal or equitable, in and to the shares of the New Company by El Paso.

Now, the Court has asked us to review the authorities and submit a memorandum, and this we have done.

In substance, this memorandum shows that in a great many cases this procedure which we propose has been followed. I know of no case in which any court has ever rejected this procedural method. On the contrary, as a matter of fact, the Supreme Court has had occasion to comment upon proceedings of this character, and I refer particularly to the *Brown Shoe* case, *Brown Shoe Company* v. *United States*, 370 U.S. 294, which is discussed at the beginning of Page 7 of defendants memorandum.

There, the Court will recall that the trial court held that the acquisition of Kinney Shoe Companies by Brown Shoe

Company was a violation of Section 7. And the court, being mindful of the difficulty of determining the details of divestiture at a time when divestiture was not practicable, [fol. 609-849] had occasion to say this:

"If this judgment should become final in its present form, the defendant Brown would be confronted with the necessity of the disposition of the stock of Kinney. This could have far reaching effects and consequences.

"It is this Court's conclusion that should this judgment become final, this Court should hear any evidence which the defendants might wish to offer touching the effects of the disposition of stock and suitable manner in handling same. The Government should be given an opportunity to express opposition or suggestion therein."

Now Brown elected not to avail itself of this opportunity to litigate divestiture details. Instead, it appealed directly to the Supreme Court and the question was then raised as to whether this was an appealable order. The Supreme Court did hold that it was an appealable order, and what it said in that connection I think is indicative of what the proper procedure is in this matter now before this court. The Supreme Court said:

"We note, first, that the District Court disposed of the entire complaint filed by the Government. Every prayer for relief was passed upon. Full divestiture by Brown of [fol. 609-850] Kinney's stock and assets was expressly required." As indeed we propose this court shall require in this decree.

Pointing to the character of the divestiture decree still to be entered in this suit, as supporting its holding, the Court further said:

"Such an order for divestiture requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum, but, rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling in-

fluence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assured expeditious enforcement of the antitrust laws. The delay in withholding review of any of the issues in the case until the details of a divestiture—" I repeat "—the details of a divestiture had been approved by the District Court and reviewed here could well mean a change in market conditions sufficiently pronounced to render impractical or otherwise unenforceable the very plan of asset disposition for which the litigation was held."

While, of course, the Court was not passing directly [fol. 609-851] upon whether such a procedure would be required, or directly upon whether such a procedure is not required, it is perfectly clear from its comments that the Supreme Court implicitly approved the very method of procedure which El Paso proposes here.

Now the Supreme Court further referred to the deferral of decision on precise details of divestiture until divestiture at hand is not only right but traditional, saying with respect to that:

". . . would require a departure from a settled course of the Court's practice. It has consistently reviewed antitrust decrees contemplating either future divestiture or other comparable remedial action prior to the formulation and entry of the precise details of the relief ordered. No instance has been found in which the Court has reviewed a case following a divestiture decree such as the one we are asked to consider here, in which a party subject to the decree has later brought the case back to this Court with claims of error in the details of the divestiture finally approved."

And we point out to the Court again that in the proposed decree we propose the disposition of all of those questions which stand in the way of the creation of a New Company with assets and in business and with shares of [fol. 609-852] stock that have value, whatever that may be.

We leave for the future only the precise details of the divestiture, and we suggest to the court that there will be ample time for the court to consider what, in the last analysis, will best satisfy conformity with the antitrust laws of the United States and, at the same time, best determine what in the then condition of the market and of the company and when the marketability of the stock, what precise method should then be followed with reference to disposition.

We say that we have already cited to the court and we cite in the memorandum which we have left here other cases in which this same procedure has been followed. We know of no case in which this procedure has been rejected. We think that it enables us to make some progress in forming a company which will be in business with assets and will be serving Pacific Northwest and will have shares with value. We have nothing of that sort at the present time. We have nothing to sell. We have no company; we have no marketable shares; we have no market.

I submit to the court that the precise details to be followed with respect to disposition on matters which should be deferred pending the better information of the court as to what the conditions will be when we have shares of stock to be divested.

Now, I note that plaintiff has a memorandum which he [fol. 609-853] has been kind enough to give us a copy of, in which memorandum the Government pleads that indeed this procedure before the Federal Power Commission, which seems to be required under the law, may take an inordinately long time. It is suggested in the memorandum that it may take from one to three years.

While I realize, and we all realize, that some material amount of time will be required, it is certainly the hope of the company that it will not take any three years. It is the expectation of the company that it will not take more than a year, and we hope less. However that may be, the longer it takes the longer deferred is the date upon which we will have a company with assets, with a business, with

a certificate, and with stock which can be disposed of, and I suggest to the court that to determine the precise details of the disposition of that stock for as much as three years before the stock will be available for disposition is not good judgment.

On the other hand, by proceeding with the other matters we will be cutting back on the time, we will cease the delays which have gone on for eight months, we will have a New Company, we will have applications, and we will at least start the time running within which the Federal Power Commission will act hopefully in a much shorter time than predicted by the Government.

Now, neither does the memorandum of the Government [fol. 609-854] in a quick perusal suggest how in the world the court would determine the precise details at this time. To determine the ownership of the New Company before there is a New Company, and to determine the precise method by which you would determine that ownership, and by what manner the new ownership would acquire it, is beyond my imagination, may it please the Court. I think the Court itself has noted in a comment on the record that many things may change in the period between now and when we will have shares to divest, including perhaps the attitude of the defendant, or the plaintiff, or both. So we have that possibility as well as a certainty that conditions will not remain stagnant, that we are in changing business conditions, as the Supreme Court has said, and I don't think any of us, even the Court, has a crystal ball to enable it to now prescribe the precise details of divestment if, indeed, as the Government suggests, the court is predicting conditions two to three years hence.

SUBMISSION TO COURT BY MR. LIPSON A MEMORANDUM IN OPPOSITION TO THE EL PASO PROPOSAL, ETC. AND MEMORANDUM ON CONDITION OF PACIFIC-NORTHWEST PIPELINE CORPORATION

Mr. Lipson: May it please the Court, we have prepared, as your Honor directed, a memorandum entitled, "Plain-

tiff's Memorandum in Opposition to the El Paso Proposal to Postpone a Determination of the Ownership of New Company." We submit it to the Court.

Your Honor, at the last session, also requested that the Government conduct some research to determine whether or not a new corporation can be chartered prior to a deter- [fol. 609-855] mination of the assets that the new corporation would have. We have done some research on that, and we have incorporated it in that same memorandum that I have just handed up to your Honor.

Your Honor at the same time also requested that the Government—that both parties—prepare memoranda that would summarize the condition of the Pacific Northwest Pipeline Corporation at the time of the El Paso-Pacific Northwest merger. We have done so, your Honor, both with reference to the Supreme Court's decision in the matter and with reference to the Supreme Court's decision in the matter and with reference to the trial record in this case, citing both the Supreme Court decision and specific exhibits and testimony in the trial of this case. May I submit that memorandum, your Honor.

The memorandum with respect to the proposed El Paso divestiture decree which was given to us this morning states, together with my statement of the prior session—I forget the date—states the Government's opposition to this method of procedure. Unfortunately I find myself unable to comment with great detail on plaintiff's proposed decree, since it was handed to us a few minutes before, but to the extent that it generally comports with the earlier description our objections remain.

I will say this, your Honor: that I will take this decree that defendants have given us back to Washington, and obviously my superiors will have a chance to look at it. I [fol. 609-856] cannot predict with absolute certainty at this time what their opinion will be, unfortunately. The Assistant Attorney General is out of the country in Europe at this time, and he is not expected to return for another week.

The Court: Well, we are going to go ahead and proceed.

Mr. Lipson: Yes, your Honor.

The Court: I don't think we are going back to Washington. We are going to stay here for awhile.

Mr. Lipson: I don't want to burden the Court with a restatement of the entire series of objections the Government finds with respect to the new proposed decree that El Paso has submitted. In general, as we see it, it will result in a greater delay before an effective divestiture decree can be handed down by the Court, and during the period of time, contrary to what counsel says, we will not have divestiture, because it is clear that during this period of time the New Company will be a subsidiary of the El Paso Natural Gas Company, and by no stretch of the imagination can that be called divestiture, your Honor. Certainly not in the context of this case, and it is this case, I would like to emphasize—

The Court: Well, the trouble is that as soon as possible we ought to have a corporation that can go to the Federal Power Commission and obtain certification. Now, you can't dispose of this case all in one bite. You have got to start [fol. 609-857] somewhere, and it looks to me like it would be a pretty good thing to do to organize that corporation, get it on the road, get that chief executive officer and some management. Now, if we don't do that, where would you start?

Mr. Lipson: Your Honor, there is no reason why we can't proceed to create this corporation, assign the assets to it, and determine the manner by which the stock will be held. Because one of the first questions that a Federal Power Commission certification inquiry will ask will be questions with respect to the character and ability of the management. Now, if the management should be appointed by El Paso, it will not necessarily—

The Court: El Paso isn't going to appoint the management. The Court is going to appoint the management.

Mr. Lipson: If the management is appointed without reference to the owner, clearly the management cannot be responsive to the ownership of the corporation. And I think we would take the position that the management necessarily has to be responsive. Yet the ownership of the corporation will remain completely undetermined for a period of years.

The Court: I wouldn't say "a period of years."

Mr. Lipson: Well, certainly for a long period of time, your Honor.

Now it is this management that are going to make the initial decisions with respect to the certification and with [fol. 609-858] respect to the operation of the New Company, and to an extent they will clearly bind the character of the New Company for the future. They will impress upon the New Company the character of their own management. Certainly if this new management is installed under long-term contracts, as probably will be the case—since management will probably ask for it merely to protect themselves—again the future owners of this corporation will have management thrust upon them that may not be responsive at all to the character of the ownership.

I would like to refer your Honor to the case that the Government has cited previously in its brief and referred to in connection with the Reading litigation. And if I understand the Continental case, which is the case I am referring to, properly, there the court determined the ownership of the company before the company was set up and before the stock was actually issued on the market place. This is clearly something that can be done, something that El Paso itself anticipated could be done, when it approached this court with its initial plan that stated the method by which El Paso anticipated the stock in New Company would be distributed.

We are not asking for anything different than that kind of a determination, except that we differ with them on the way the stock shall be distributed. It certainly is strange that El Paso now comes to the court and says: "This shouldn't be done at this time. No such determination [fol. 609-859] should be made, because it's premature." Yet this is exactly the kind of determination that El Paso has asked this court to make earlier in this hearing.

The Court: I don't think there is anything strange about it. The folks are thinking mature in the course of a proceeding like this. As you are well aware, as a result of conversations in chambers, the situation may change in a year or two, more or less. El Paso's notion about what they want to do may be very different from what it was when this original decree was drafted. It makes sense, it seems to me—what do you say about that language in the *Brown Shoe* case that Mr. Harrison just read to us? It is in his memorandum.

Mr. Lipson: Yes, your Honor. As I understand it, and as Mr. Harrison himself emphasizes, the question before the court there was whether or not the decree of the district court in *Brown Shoe* was a final decree. We have no argument with that. That decree was a final decree.

The Court: Their language went further than that.

Mr. Lipson: But this case comes before this court in a completely different posture than the *Brown Shoe* divestiture decree. This is the first case, to my knowledge, your Honor, where the Supreme Court has taken upon itself to order divestiture in the manner in which it did.

Now, for this court merely to repeat an order of divestiture would, in our opinion, not conform with the Supreme [fol. 609-860] Court's mandate in this case. It would, in effect, be delaying that. Now, this was not the case in *Brown Shoe*. In that case—the El Paso case comes before this court in a completely different light and cannot be judged by the type of decree that the Government has—strike "the Government"—that courts have entered in other

merger cases. We are one step beyond the step the district court was in when it issued the order referred to in the *Brown Shoe* case. Mr. Harrison, if I understand it correctly, would have us take a backward step.

The Court: I don't think so. Now, this is on Page 9 of El Paso's memorandum, the first full paragraph. Pointing to "the character of the divestiture decree still to be entered in this suit". Now, this is the Brown Shoe. "Pointing to the character of the divestiture decree still to be entered in this suit," at page 309, the court observed—this is the Supreme Court of the United States talking—"Such an order for divestiture requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum, but, rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assured expeditious enforce-[fol. 609-861] ment of the antitrust laws. The delay in withholding review of any of the issues in the case until the details of a divestiture had been approved by the District Court and reviewed here could well mean a change in market conditions sufficiently pronounced to render impractical or otherwise unenforceable the very plan of asset disposition for which the litigation was held."

Now if that isn't right on the nose, I don't know what could be closer. The court is pointing out that we have got to take a careful, perhaps an extended, look at this thing. Of course, that is what we are in the process of doing. It seems to me that we would expedite it to get that corporation going, get the management set up, get applications in to the Federal Power Commission, and a decree of divestiture would be the decree of divestiture. About the only thing we wouldn't have in it is how we are going to dispose of New Company stock, and that seems to me to be a question that requires that careful, extended negotiations and formulation that the court is talking about.

Mr. Lipson: As we view it, your Honor, that is precisely the point at which we are at this time in these proceedings, that we are at the point where we are conducting the extended negotiations and formulation and the entire decision making process for creating New Company and distributing it to the public. We are at the step beyond the step in Brown Shoe. We have gone further than the court [fol. 609-862] has gone in Brown Shoe. The Supreme Court has already taken the burden of ordering divestiture in this case; therefore, the type of order that was issued in Brown Shoe is a thing of the past. We are now at the next step, and I think that at this step we are bound, under the Supreme Court mandate in this case, to make the determination as to the composition and the ownership of New Company.

Now obviously the court will have continuing jurisdiction in this matter and should the situation change in any respect as to the assets or as to other matters where the court feels that a re-examination of its decree is in order, obviously the court has that power, we think, before the actual sale takes place. So to the extent that there may be a great change in the market, this is no argument for the court not to take the burden of making this decision at this time, and I would like to refer to the specific language of the Supreme Court where it ordered that the divestiture take place in this case without delay.

Now, this was not so in Brown Shoe. This distinguishes the El Paso case from every other divestiture case in recent years. This is the case where the Supreme Court has already taken care of the ordering of divestiture. We are here to effect an appropriate remedy that would comport with that order, and we think that a failure to determine the ownership of the New Company would be a failure to [fol. 609-863] comply with that order in its most meaningful sense.

Your Honor, at the conclusion of last week's testimony—the testimony of the last session—Mr. Harrison made some

statements regarding the condition of Pacific Northwest Pipeline Corporation at about the time of the merger with El Paso.

STATEMENTS BY MR. HARRISON AND MR. LIPSON

Mr. Harrison: Could I, Counsel, have a few minutes to complete my statement on the subject you are now discussing before we take up the next subject?

Mr. Lipson: With your Honor's permission, Mr. Harrison.

Mr. Harrison: In the first place, if the Court please, we didn't want to be understood as saying the *Brown Shoe* case is the only case in which this sort of thing has been done. It has been done in a great many cases. The court already has a memorandum on that, but we would like to call specific attention to *United States* v. *RCA*, which is referred to on Page 11, and we say so because we had there a regulated company, and we had there a situation where it was necessary for the company to obtain a certificate from the Federal Communications Commission with respect to the disposition of certain stations. There was a consent decree ordering the divestiture, but it did not specify the divestiture details. The court recognized that divestiture of radio broadcasting properties would require approval of [fol. 609-864] the SEC. The decree itself, therefore, provided only that defendants shall sell, exchange, or otherwise dispose of all right, title and interest in the stations to a person or persons not controlled directly or indirectly by either defendant and in which neither defendant has any substantial ownership interest. And this was to be done before the end of 1962, some three years later.

What happened was that as December 31, 1962 approached the Commission hadn't yet acted, and so then the company applied for an extension of time under the divestiture decree, which was opposed by the Government.

In the meantime, however, the Federal Communications proceeded to issue an interim certificat , and the court approved this procedure.

We refer to that particular case because the facts and procedure are so similar to the case we have here.

Now, the next thing I would like to point out is that counsel has not suggested—first, I wish to point out to the court that we propose a decree to this court which was founded in its whole structure upon the assumption, justified or otherwise, that somewhere along the line the parties would come to agreement. And in the proposal which the company made purporting to offer some nearly one hundred million dollars of additional properties to the New Company, it did so in the belief, hope and expectation that it [fol. 609-865] would have the right to distribute to their shareholders. We find, however, that there is no hopes of such an agreement, and we find ourselves confronted with the necessity of going to an adversary position with respect to the decree.

So it seemed to us that since that was not consented to and since it seemed that that represented a point of sharp difference between the defendant and the Department of Justice, that we at this time would not press for decision upon that question but would be content to let the details of divestiture to be decided later, and that is the reason for this proposal now.

Above all, to end delay, and above all, to get our show on the road, so that somewhere along the line we can divest some stock which does not yet exist.

Now, counsel has made no concrete suggestion as to how the court would accomplish the sort of divestiture now that he wishes. He has made no proposal as to how you could find a buyer, designate the buyer, and sell nothing to the buyer. There is nothing to sell; no shares have been issued; there is no way in which the buyer could undertake to determine what he would be willing to pay; there is still the prospect not only of the decree to be entered, but there is the prospect of proceedings before the Federal Power Commission. He would be undertaking to buy a company yet to be formed, yet to acquire property, yet to have the

[fol. 609-866] right to engage in business, and with no management yet set down for him to look at and consider with respect to value of the stock to be issued in the future. It is not salable; there is nothing to sell, your Honor. Counsel doesn't offer the slightest suggestion as to how this court could proceed at this time to order a divestiture in either of the several manners he has suggested or otherwise.

So the court is not delaying anything. If the court proceeds this way we can form the company, we can issue qualifying shares, we can put them in trust. The company can select management with a designation and approval of this court, and we are on our way. The company will then be represented before the Federal Power Commission, and the court will have representation of the New Company under its jurisdiction and control, and we will proceed just as rapidly as we can, because the company, above all, that is to say, El Paso, above all, wishes to have a going company serving the Northwest at the earliest possible opportunity. It wishes to have the assets transferred, the debt rearranged, and shares of stock of substantial value, which after all are the property of El Paso, and it hopes if it is required to sell to others, it is not permitted to distribute to its shareholders, that it at least will get a fair price for that stock. And it doesn't think there is any prospect of that happening today, or within the immediate future.

[fol. 609-867] And so with that further comment, if the Court please, we would like very much to see the issues resolved effecting the transfers of property and instructions given by the court to proceed before the Federal Power Commission and management selected or approved by this court.

Mr. Lipson: Just the further comment with respect to the matters brought up by Mr. Harrison. As I say I haven't had an opportunity to peruse in detail the memorandum Mr. Harrison submitted this morning, but I would like to emphasize that—

The Court: Do you want to take half an hour to do that? I think we ought to settle this now. I think you ought to have an opportunity to read it and study it.

Mr. Lipson: We would like to have the opportunity, your Honor, but I would like to mention at this time that the RCA case that he refers to and the decree that he refers to in that case was a consent decree, and that has no authority for determining what this court shall do in a litigated action. It is a completely different footing, your Honor. There was no order in the RCA case corresponding to the order in this case.

The Court: Mr. Harrison says on Page 12, the last paragraph, "We cite these proceedings not as establishing a legal principle controlling El Paso's proposal but as persuasive evidence of the soundness of the view of the Su- [fol. 609-868] preme Court in Brown Shoe." In other words, this is something that people thought was practicable and sound, and that is all it is offered for. Of course, in the first place, the Federal Trade Commission case isn't binding on this court. Of course, as you have suggested, it was a consent decree; this is not. But certainly it sounds to me as though this is a sound practice. They thought so there, and the court thought so in *Brown Shoe.*

I don't propose to leave all the questions unsettled, you know. We are going to start talking pretty quick about San Juan Basin reserves of the Pacific Northwest and what, if any, additional reserves shall be allocated to the New Company. That is one thing. We are going to talk about half a dozen other things that have been raised here and which we have had some argument about.

I want to take those up one at a time with you and you tell me anything you want to about it, about each one of them, and I am going to decide it. There will be an opinion on them, and in the decree which I propose to enter we will decide those things.

Now, the main thing that we are deferring is how El Paso shall dispose of the New Company stock resulting from the formation of the New Company and which will be received

in exchange for the utility plant and all the rest of the property, assets and liabilities, which will be transferred [fol. 609-869] to the New Company.

Now, that is a pretty large mouthful that we are postponing there, to be sure, but it seems to me to be sensible to get these other things out of the way, get them decided, give you a decree; a decree of divestiture is what it will be, and you can get it reviewed. And I imagine they will review that right away. I would think that this case would probably be at the top of the list when you get it up there. They will decide that before spring is over, and we will be on our way. There will be a divestiture decree all right, and that will be final and binding. And later on the transfers of the utility plant and various assets and arrangement of the debt will be accomplished. And, finally, we will get rid of that stock.

I don't think we have to do that today. I don't think we have to do that in advance of all the other things we have to determine in this case. It just doesn't make sense to me. I think you are getting the cart before the horse.

Now, one thing I asked you last time you were here to do was to suggest to me in what order you want to discuss these various things that we must determine.

Mr. Harrison: I have here a proposed agenda which I will submit to the court, and a copy to counsel.

The Court: I will be looking this over, and we will give Mr. Lipson an opportunity to review this memorandum, [fol. 609-870] and you folks an opportunity to review his, and I will come back in here after awhile.

(Recess had.)

[fol. 609-871] Mr. Lipson: Your Honor, on examination of the selected portions of the *RCA* decree that are found on Page 11 of the brief submitted by defense counsel this morning of the memorandum it seems strange, because, in the context of this litigation, what the Government is seeking here in the El Paso case, among other things, is the

possibility of a direction from this Court that El Paso sell the company to be divested to a third party; and the defendants cite the decree in the *RCA* case, and, as I read it, that is precisely what the parties consented to in that very decree. It provided for a third-party sale. It provided for a manner by which the ownership would be—

The Court: That is beside the point. That is beside the point. That isn't what it is offered for, and it isn't what the Court is accepting it for.

Mr. Lipson: We think it is applicable for that, your Honor.

The Court: It certainly isn't binding on me, a Federal Trade Commission case, on the decree I enter here.

Mr. Lipson: I think it is also relevant, your Honor, that the—

The Court: The point about that is that the practice of entering a decree of divestiture without a specification in detail of some of the matters seems to be a sound and accepted practice. That is what was done in the *Brown* [fol. 609-872] *Shoe* case. It is what, in the *Brown Shoe* case, the United States Supreme Court describes with some care and thoughtfulness as a practical, really, and necessary sort of procedure. And this *RCA* case shows that those folks felt the same way about it, whether it is a consent decree or not a consent decree. All it is offered for is to show that this is a practice which has been accepted in the *RCA* case and in the *Brown Shoe* case, which is referred to as indicating a sound and practical disposition of the matter. So what difference does it make whether it is a consent decree or not? If it hadn't been a consent decree, it would have been binding on this Court.

All right.

Mr. Lipson: I would just like to emphasize that the *RCA* decree doesn't go into the details your Honor referred to, yet it does specify, as we read it, a sale to a third party.

Perhaps we are being unduly held up on the meaning of this word "details" and the way it is being used in Court.

The Court: Let's not waste our time talking about that sort of thing. Let's begin to make a little progress here.

You have opposed everything that has come along the road, everything. When we started these hearings way last year, you came in and said you opposed, the Government [fol. 609-873] opposed, El Paso's proposals in totality, and you have demonstrated it ever since.

That is your right and your privilege, and we are going to sit here and listen to you, but I am going to suggest to you that it isn't getting us anywhere now this morning. Let's get on to something.

Mr. Lipson: Your Honor, the Government doesn't propose anything more in the decree in the way of details than the Supreme Court has already sanctioned in the *Continental* case and the *Reading* litigation and in the *Union Pacific* litigation.

The Court: Yes, I understand that.

Mr. Lipson: Perhaps the Government has been remiss, your Honor, in not drawing the Court's attention to a statement in the case of the *United States* v. *DuPont and Company*, 366 U.S. 316 at Page 334, where the Supreme Court states:

"For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."

And the Supreme Court, in a footnote to that statement, cites *United States* v. *Bausch and Lomb Optical Company*. It also cites Local 167 of the *International Brotherhood of Teamsters* v. *United States*, and it cites other cases as [fol. 609-874] well in that footnote.

We think the Government is entitled to just that consideration, your Honor.

The Court: You are going to get that consideration. That is what you have been getting. The Court has to resolve those questions.

Mr. Lipson: Finally, I would merely like to state that, with reference to the *Brown Shoe* litigation, this case comes

before this Court in somewhat different posture than the *Brown Shoe* case was decided, and the language quoted from the *Brown Shoe* litigation was presented to the Supreme Court.

The divestiture order has already come down, and we should be further along than merely ordering divestiture once again. That has already been carried forward.

We are interested at this stage in the disposition of the assets to be divested.

Mr. Harrison has also stated that there is apparently a lack of authority, or a lack of logic, for the proposition that we can determine the assets at the same time as determining the ownership of the New Company, yet, as we view it, this is precisely what the Supreme Court has sanctioned in the past and what has occurred many times in these divestiture cases.

I would merely like to cite the *Continental Assurance* [fol. 609-875] case once again as authority for that proposition that the ownership can very well be determined at the same time as the assets are determined, the assets to be divested.

If your Honor prefers, I would like to address myself now to the matter of the allocation of gas reserves.

The Court: Very well. Have you a copy of Mr. Harrison's agenda?

Mr. Lipson: Yes, I do, your Honor. I believe we are in agreement that the next item to be taken up will be the allocation of gas reserves.

The Court: Will you show me on this map, one of you, the point north of which everything is transferred to the New Company in the proposal. Where is it on this map?

Mr. Lipson: If I am correct, your Honor, it would be everything north of Ignacio, Colorado, which would be just about where my finger appears on the map, north of the area delineating the San Juan Basin.

The Court: What town is close to it?

Mr. Lipson: Is Durango the closest town, Mr. Harrison? Do you agree to that?

Mr. Harrison: Yes.

Mr. Lipson: Durango, Colorado.

The Court: Yes, all right. Roughly, north of Durango?

Mr. Lipson: I think it is a little south of Durango.

[fol. 609-876] The Court: Yes, all right.

Mr. Lipson: It is difficult to tell from the map precisely.

The Court: Now, show me where those two pipelines enter Canada, will you, on this map.

Mr. Lipson: There is the connection with the West Coast Transmission pipeline at Sumas on the Washington States-British Columbia border that I am pointing to now. That is near the town of Bellingham in Washington, and I suppose the largest city in British Columbia is Vancouver, just a little further.

The Court: Yes, all right.

Mr. Lipson: The PGT pipeline, according to the map, crosses from Alberta into the United States at a point Kingsgate, which is just north of—I am afraid there is no corresponding American city in that area.

The Court: Yes, I can find that. Thank you very much.

Mr. Lipson: Just where the Idaho-Montana border meets.

The Court: Now, as I understand it, the PG & E have a pipeline up there.

Mr. Lipson: I believe they own the controlling interest in the Pacific Gas Transmission pipeline.

The Court: Pacific Gas Transmission is their pipeline, [fol. 609-877] is that right?

Mr. Lipson: That is my understanding.

The Court: Where does that come in?

Mr. Lipson: With PG & E, your Honor?

The Court: Where do they connect with the Canadian field?

Mr. Lipson: At Kingsgate. The pipeline I referred to is this Kingsgate. They connect, according to this map, up through—several hundreds of miles into the Province of Alberta, as far north as Kaybob and Windfall.

The Court: Very well, go ahead.

Mr. Lipson: In the Government's view, your Honor, if the New Company to be created here, does not obtain an additional quantity of gas reserves from El Paso, it will not be in a position to compete with El Paso in order to serve the California market.

The Court: Now, wait a minute. Mr. Harrison's agenda proposes that we talk about proposed contracts between El Paso and New Company relating to Kingsgate.

Mr. Harrison: No, your Honor. We have stipulated that we take up the gas reserves in San Juan first.

The Court: Oh, you did.

Mr. Harrison: Yes.

Mr. Lipson: It appears in the first paragraph of Mr. Harrison's agenda.

[fol. 609-878] The Court: Oh, yes, all right. Go ahead.

Mr. Lipson: We believe that the New Company needs additional reserves in order to compete with El Paso for the California market.

The Court: Well, they didn't ever belong to them. All well and good to talk about divestiture which returns to New Company the property that Pacific Gas and Electric—I mean Pacific Northwest—owned and the additions and the improvements, and so on, to that property which Pacific Northwest owned at the time of the merger, but it is a wholly different thing and, it seems to me, unwarranted to say that you are going to have to give them some more reserves that they never owned and that El Paso acquired with its own money and resources. You are not talking about divesting assets and property of the old Pacific Northwest. You are now talking about El Paso's making a present to a New Company so it would be in a better shape to compete with them.

Now, that isn't the point in this thing. We are not here to give a New Company, or any company, something they never owned just for the purpose of making real good and sure that El Paso is weakened and the New Company is strengthened for the purpose of beating El Paso out in California somewhere.

I just don't understand that, Mr. Lipson, and I would like to hear you justify that.

[fol. 609-879] Mr. Lipson: The property the Government is referring to, your Honor, is not property that El Paso owned apart from the Pacific Northwest Pipeline Corporation.

The Court: I understand. It is reserves that El Paso has acquired since merger.

Mr. Lipson: Correct, your Honor.

The Court: Yes.

Mr. Lipson: Therefore, it is property that was owned by the merged company, and it was owned as much by the Pacific Northwest part of the company as by the El Paso part of the merged company, and we think that, in divesting the Pacific Northwest part, some appropriate allocation should be made of these commonly held properties. We think it would be less than fair not to do that.

Apart from the considerations of fairness we believe it is desirable from the proposition of competition.

Let me illustrate, your Honor. Based on El Paso's own figures for the present market requirements of the Northwest, the New Company would have a reserve life index of 27.4 years. That is under the current El Paso proposals. But, if New Company would try to serve even a small increment of this California market with the gas reserves allocated to it—I am referring now to the smaller of the current proposals being advanced by El Paso, a proposal of 250 million cubic feet per day to California. In that case New Company's reserve life index would plummet to [fol. 609-880] something like 20.6 years. This is a mathematical computation that is easy to effect. This would be far below the comparable El Paso reserve life index of 26.8 years after this divestiture.

The same 250 million cubic feet, your Honor, represents, as we said, the smaller of the two current proposals before the Federal Power Commission. Similarly, New Company's deliverability life would fall from fourteen years to

—what Mr. Boyd has testified to—only two or three years if it put through—that is, if New Company put through a comparable proposal to serve California.

And Mr. Boyd's testimony on this point appears at Page 290 of the transcript of these proceedings.

In other words, New Company would be in no position whatever to compete with El Paso to serve California if it were denied the fair share of the gas that was acquired since the two companies combined.

The Court: Pacific Northwest never was—Pacific Northwest never was in any position to compete with anybody down in that San Juan Basin with the reserves there. As a matter of fact, Fish's approach to the California market was from the Northwest.

Mr. Lipson: Your Honor, on Page 658 of the Supreme Court decision in United States v. El Paso the Supreme Court made the statement that Pacific Northwest—and I [fol. 609-881] am quoting now—"Though it had no pipeline into California, is shown by this record to have been a substantial factor in the California market at the time it was acquired by El Paso."

On Page 661 of the same opinion—

The Court: Are they talking about the San Juan Basin when they say that?

Mr. Lipson: They are talking about all the things that go together to make up a pipeline, your Honor.

The Court: Yes.

Mr. Lipson: Let me refer—

The Court: Well, they are just simply not talking about the San Juan Basin when they say that.

Mr. Lipson: Well, they are talking about the San Juan Basin to this extent, your Honor, if I may quote one portion of their opinion—and I am quoting now from Page 661 of the Supreme Court's opinion:

"Pacific Northwest had proximity to the California market—550 miles distant in Wyoming, even nearer in Idaho, only 250 miles away in Oregon. Moreover, it had enormous

reserves in the San Juan Basin, the Rocky Mountains, and Western Canada. Had Pacific Northwest remained independent there can be no doubt it would have sought to exploit its formidable geographical position vis-a-vis California."

There the Supreme Court directly referred to the San [fol. 609-882] Juan Basin.

The Court: Yes, but they a whole lot more pointedly referred to the 250 miles from Oregon and the closeness of Idaho. No use closing our eyes to it.

Pacific Northwest was operating in the Northwest. That is where they were operating. And Ray Fish was negotiating with PG & E about gas from the Northwest, enormous reserves in the Canadian fields. That is all he is talking about.

Mr. Lipson: Pacific Northwest had entered into an agreement to serve the Southern California market. It could serve the Southern California market with Canadian gas or with San Juan gas or Rocky Mountain gas or gas it received anywhere. We think that logically the San Juan gas would have been useful, either directly or through displacement.

After El Paso had acquired Pacific Northwest, your Honor, they proposed using the old Pacific Northwest line as the basis for a pipeline into California, largely to serve the southern California market. This was the Rock Springs line. And that took off, not from Canada, your Honor, not even from the Northwest states. That took off from Rock Springs, Wyoming. And the gas from the San Juan Basin was used in that proposal through displacement.

Gas coming into Southern California through that Rock Springs proposal that El Paso had put before the Federal [fol. 609-883] Power Commission and strongly fought for came from as far off as one of the north Texas gas fields.

Mr. Harrison: If your Honor please, I am sorry, but since there is a question of fact involved here and since the decision of the Federal Power Commission states the

facts, I feel called upon to ask permission to correct counsel in that. Of the 400 million cubic foot a day gas supply, 300 million came from Colorado Interstate Gas, the balance from the total resources of El Paso, and it did not come from the San Juan Basin. The origin of it was Kingsgate insofar as Pacific Northwest was concerned, and, incidentally, it was rejected as uneconomical.

Mr. Lipson: Your Honor, I would like to emphasize the fact that Colorado Interstate was, I believe, a half partner to the Rock Springs venture, because New Company would be in the same position. It would be able, if it had the additional quantity of gas we are referring to, to combine with Colorado Interstate. If neither could serve California alone, the two might be able to do it successfully.

There are other gas reserves owned in the area, in the Rocky Mountain area, the San Juan area, that can be combined with the gas that the New Company would have to bring in to California. And the San Juan gas is useful, as I have said, either directly or by displacement of other gas reserves, in order to facilitate a delivery of gas to the [fol. 609-884] California market.

Contrary to what counsel has said—and I believe he has said it repeatedly—the Supreme Court, as we view it, has made a determination that Pacific Northwest—and we are quoting the Supreme Court here—"was no feeble, failing company; nor was it inexperienced and lacking in resourcefulness. It was one of two major interstate pipelines serving the trans-Rocky Mountain states; it had raised 250 million dollars for its pipeline that extended 2,500 miles through rugged terrain. It had adequate reserves and managerial skill. It was so strong and militant that it was viewed with concern, and coveted by El Paso."

Now, these statements appear on Pages 661 and 662 of the Supreme Court decision, and I would just like to emphasize that each of these statements that the Supreme Court has made with respect to the characterization of Pacific Northwest find an abundance of support in the record,

your Honor, and we have submitted a memorandum today to the Court which details those parts of the record that support the Supreme Court's determination even if such were necessary.

The Court: Have you handed that up?

Mr. Lipson: Yes, your Honor, we have given that to you.

The Court: Oh, yes, I see it. All right, go ahead.

Mr. Lipson: From the information that we have just [fol. 609-885] presented with respect to the decrease in the reserve life index and the deliverability life of New Company should it try to serve California, it is pretty clear that it would be impossible for New Company to put forward a line to serve California without obtaining additional gas.

The pertinent question, so far as we are concerned here, would be how much additional gas New Company is entitled to receive and from where should it be obtained.

The amount of gas that we suggest to be added under the El Paso divestiture plan is 600 billion cubic feet.

We have already argued and summarized the evidence with respect to the comparable positions of Pacific Northwest and El Paso in the San Juan Basin itself and have shown, I believe, that the addition of a 600 billion cubic feet quantity of gas would enable the New Company to come back to the relative position that Pacific Northwest occupied with respect to El Paso so far as gas reserves in the Basin are concerned. But I would like to go beyond that. I don't want to repeat what is already pretty clearly established in the transcript. I would like to state (1) that the 600 billion cubic feet alone would not be enough to build a pipeline to California. However, it would be sufficient to supply perhaps between 90 and 100 million cubic feet a day and, therefore, it represents a substantial assist in formulating any new project with Colorado Interstate, with the Southern California Companies that own con- [fol. 609-886] siderable gas in the Rocky Mountain areas, or with all the other holders in the area.

We have no favorites as such that we are putting forth to the Court. We would expect that the market would take its own course. We think that the 600 billion cubic feet figure also represents that quantity of gas that would put New Company into approximately the same position as Pacific Northwest occupied prior to the merger.

Even if we assumed the accuracy of the testimony that El Paso's engineer witness provided—

The Court: It was not contradicted, was it? It stands uncontradicted in this record. So what are you talking about, "assuming it"?

Mr. Lipson: Your Honor, we did contradict it with our own expert witness, Mr. Hess.

The Court: Who is Mr. Hess? Is he the fellow—

Mr. Lipson: No, your Honor. There is a dispute, but, even assuming the accuracy of the El Paso figures, it is clear that the 600 billion cubic feet represent the amount that would restore the relative positions of Pacific Northwest and El Paso in the San Juan Basin as their relative positions existed prior to the merger.

We think that the San Juan Basin itself is the logical place from which the gas should be obtained. It is the closest geographic source to the California market, and, [fol. 609-887] most importantly, it is the area where both Pacific Northwest and El Paso competed for gas reserves prior to the illegal acquisition.

The San Juan Basin is also the area where the Pacific Northwest program of acquiring additional gas reserves came to an abrupt halt at the time of the stock acquisition in this case.

However, it has also been established that the San Juan Basin holds huge amounts of additional gas that have been discovered since the date of the stock acquisition.

Pacific Northwest and its successor, the Northwest division of El Paso, and the proposed New Company under the El Paso plan will not participate at all in this newly discovered gas.

In the language that defendant has used, therefore, the San Juan Basin has a definite nexus to this litigation, more so than any other gas-producing area. Therefore it is the San Juan gas that we should look for as the source of additional reserves to which New Company should be entitled, because that is the area where there was real competition between Pacific Northwest and El Paso prior to the merger.

We heard at the time of the trial on the merits of this case, your Honor, that whatever competition may have existed prior to the stock acquisition, it is meaningless, because all the gas has been taken up in the Basin. There [fol. 609-888] is no more gas to be discovered.

And at the trial the Government emphasized that, while the horizontal areas may have been taken up, there was more gas to be discovered in lower depths.

Well, time has proved the accuracy of the Government's prediction in this, because in El Paso's annual report, 1962, they did announce that there were substantial additional discoveries in the lower formations, and these were the discoveries that Pacific Northwest was no longer able to participate in because it no longer existed, because, again, of this merger.

We think that the importance of the San Juan gas is well documented by the record in this case. Mr. Boyd has testified in these proceedings, that, when Pacific Northwest was originally certified by the Federal Power Commission, that plan contemplated that Pacific Northwest's principal gas supply—strike the word "principal"—your Honor, I believe he testified the exclusive gas supply of the company would come out of the San Juan Basin. And I refer to Page 35 of the transcript of these proceedings of the October 19 hearing.

Historically, therefore, the San Juan Basin has always been a principal source of gas for the Pacific Northwest Company or for the Northwest Divisions, and we hope in the future for New Company.

[fol. 609-889] Mr. Boyd has also testified at Pages 173 and the following pages of the transcript that, since the date El Paso acquired control of the Pacific Northwest stock—and we can take January 1, 1957 as the effective date—that since that date El Paso has acquired additional natural gas leaseholds in the San Juan Basin and that El Paso has also acquired additional gas through gas purchase contracts in the San Juan Basin.

Government's Exhibit No. 3 establishes conclusively, we believe, that Pacific Northwest did not participate with El Paso in any of the leaseholds or contractual acquisitions of gas in the Basin after January 1, 1957.

We refer again to the annual report of the El Paso Natural Gas Company itself, which is in the record here as Government's Exhibit No. 5. It is reviewed at Pages 184 and 185 of the transcript of these proceedings.

That document states, at Pages 14 and 15 of the annual report, in glowing terms, that after the merger El Paso acquired huge additional natural gas reserves in the Dakota formation of the San Juan Basin.

In that same document El Paso recites that these post-merger Dakota reserves are particularly valuable in serving the California market.

Mr. Boyd testified categorically at Page 185 of the transcript that the El Paso divestiture plan contains no provi-[fol. 609-890] sion to allocate any portion of this post-merger Dakota gas to the New Company.

The importance of San Juan as a source of gas supply for the New Company is emphasized by Mr. Boyd's testimony at Page 253 of the transcript. He testified there that the wellhead price for San Juan gas is 14 cents per mcf, and even after gathering charges are added the San Juan gas still remains about the cheapest gas along the Pacific Northwest system.

Mr. Boyd testified at Page 253 of the record that the transportation cost of delivering gas to a market is even more important than the initial wellhead price. Considering

the California market, especially the southern California market, the San Juan Basin area represents the closest large out-of-state source of gas supply. Therefore it would seem to follow that the San Juan gas would be the cheapest or certainly among the cheapest to transport to California and would probably represent the cheapest delivered price as well.

I would like to refer to the Kingsgate gas, your Honor. El Paso claims that it alone—if I understand their claim correctly—that El Paso alone is responsible for bringing the Kingsgate gas supplies to the Pacific Northwest Pipeline system. In terms of numbers the Kingsgate gas represents 1.020 trillion cubic feet.

We think that the El Paso claim is contradicted in this [fol. 609-891] record by the very statements of Mr. Boyd. He stated that all El Paso did was to pursue the negotiations for Canadian gas that Pacific Northwest had already initiated while it was an independent company. I refer your Honor to Page 27 of the transcript of these proceedings.

Also at Page 122 of the transcript Mr. Boyd states—and this is a quotation:

"The managers of Pacific Northwest, even before we took it over, recognized the value of Kingsgate gas and undertook to negotiate it."

Mr. Boyd also testified at Page 212 that the Kingsgate gas was ultimately contracted for in the name of Pacific Northwest.

There is no reason to believe that Pacific Northwest would not have been fully able to complete that same transaction successfully had it been allowed to remain independent. We are referring now, of course, to the same people that were successful in building an impossible pipeline through the ruggedest terrain in the country perhaps, the Pacific Northwest Pipeline Corporation, the same people that had raised huge sums of capital and tapped new markets. It seems strange that they would not have been able to bring

down the very gas they had been negotiating for, to all intents and to all appearances, successfully.

The Court: You have left the San Juan Basin problem. [fol. 609-892] Mr. Lipson: I am talking about the quantity of gas now, your Honor. I am referring to that, yes. They are related. We think the San Juan Basin is the logical place from which this gas should come, but we would like to show that in terms of the general amount of gas available to the pipeline, it is entitled to that quantity of gas.

Even El Paso's brief submitted to this Court, on Page 31 and the following, stresses the fact that Pacific Northwest was in a natural position to obtain the Canadian gas reserves. It seems strange to assume they wouldn't have been able to do so, therefore.

The clear inference from the defendant's brief is that Pacific Northwest was in a particularly advantageous position to tap Canadian gas reserves.

The Court: As I understand it, New Company is getting them all. That is the plan.

Mr. Lipson: Your Honor, I would like to show that New Company had them at the time they were acquired by El Paso and that therefore El Paso's claim that it is giving New Company these Canadian reserves has no real foundation. It is not giving the New Company anything but what it clearly had prior to the asset merger, and I would like to show that to your Honor.

The Court: Go ahead.

Mr. Lipson: As a practical matter, the Kingsgate gas [fol. 609-893] was always considered by El Paso to be the property of Pacific Northwest, and we believe it is properly assignable to that company or to its successor.

Even in reports that were filed with the Federal Power Commission prior to the merger date these same Kingsgate gas reserves were listed as Pacific Northwest reserves.

As we have already noted the Kingsgate gas was contracted for in Pacific Northwest's name, so, when Mr. Boyd testifies, as he did at Page 34 of the October 19 transcript,

that El Paso intends to launch New Company with probably a trillion cubic feet of more gas than Pacific Northwest had at the time "we", meaning El Paso, took it over, it should be borne in mind that the trillion cubic feet of gas represented by the Kingsgate gas is the same gas that Pacific Northwest probably would have obtained for itself had it been allowed to remain independent. El Paso has given it nothing new. Indeed, the underlying contract for these Kingsgate gas reserves, the contract between Pacific Northwest—

The Court: I don't understand that kind of argument. The fact is Pacific Northwest didn't have that gas, and you just said they probably would have acquired it but for the merger. You admit yourself they didn't have it. El Paso, after the merger, acquired it.

Now, El Paso wasn't making any contention they should hold on to it. El Paso is giving New Company, it seems to [fol. 609-894] me, by your own statement, something that Pacific Northwest didn't have. They might very probably have acquired it, yes, but they didn't have it. El Paso got it. El Paso is now undertaking to turn it over to the New Company. I just don't understand you. Maybe I am more obtuse this morning than usual, but I just don't follow that kind of argument.

Mr. Lipson: Your Honor, these were gas reserves that Pacific Northwest did, in fact, own before the asset merger date.

The Court: This is what?

Mr. Lipson: These are gas reserves that Pacific Northwest owned before December 31, 1959, the date of the asset merger in this case. These are the same reserves that the Pacific Northwest Company was negotiating for, to all appearances successfully, that it had already contracted for in a contract between Pacific Northwest and West Coast Transmission prior to the stock acquisition in this case.

The Court: Show me in the record where they had already contracted for it.

Mr. Lipson: I would be glad to get up the record reference, your Honor. It is not at my disposal immediately. I

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believe Mr. Boyd has testified to that, but I will check the record on that. That the contract between Pacific Northwest and West Coast Transmission was executed prior to [fol. 609-895] the stock acquisition date. We think that it is reasonably probable—

The Court: Now, Mr. Lipson, do you have a record reference to that?

Mr. Lipson: I can supply your Honor with a record reference to it.

The Court: Well, now, what I want you to do with respect to this claim the Government makes, the contention it makes, that El Paso should be required to transfer to New Company further gas reserves that El Paso has of its own in the San Juan Basin—now, on that question I wish you would supply me with a memorandum pulling together these references to the record that you are making, but which you don't have a citation to. I wish you would pull these things all together out of that record and give me a memorandum on that, and I wish the other side would do the same. We are not going to get anywhere listening to you or anybody else talk about that record without giving me a reference to it.

Mr. Harrison: The record reference to Mr. Boyd's testimony is Page 109.

The Court: Well, do you have your record there? What does it say?

In any event, I want you to prepare those memoranda and pull that record together on this subject, on this question. We are going to want memoranda on each one of these, pulling the record references together and giving me the [fol. 609-896] evidence. We have now reached th point where we are not holding a conversation any more; we are going to get down to the "guts" of this thing and write an opinion on it. If you want me to do that, you will have to refer to the record, refer to the evidence.

What page is that?

Mr. Harrison: 109, your Honor.

Mr. Lipson: The statement appears on Page 109. I believe it is the testimony of Mr. Boyd. Starting from the middle of the page:

"Those negotiations had proceeded to the point where West Coast Transmission, which was going to be responsible for getting it down to the Canadian border, and Pacific Northwest, which was still a separate corporation, had actually gotten to the point where they had printed a proposed contract."

The Court: That is a far cry from having the contract.

Mr. Harrison: "It was not actually signed—"

Mr. Lipson: I would like to continue.

"It was not actually signed until after we acquired the stock of Pacific Northwest, but, recognizing, as did those who were responsible for Pacific Northwest, the high desirability of availing themselves of this Canadian gas, we went ahead and signed the contract."

[fol. 609-897] Well, continuing these same statements on that point:

"And, if you go back and examine what we signed you will find that there was a short, one-page letter of intent which Mr. Kayser and I signed as officers of Pacific Northwest; and it was signed on behalf of West Coast Transmission, and we agreed to buy that gas, and we simply provided that the contract that ultimately would be executed would be in the form attached, and the form attached was the printed document that the people theretofore responsible for Pacific Northwest had negotiated out with West Coast Transmission."

The Court: We will resume at 2:00.

Afternoon Session

Mr. Lipson: With your Honor's permission, I would like to continue where we stopped.

The Court: Surely.

Mr. Lipson: I would like to address myself to the total quantity of gas reserves that the New Company will receive under the El Paso proposal.

Mr. Boyd testified at Page 205 of the record that the consumption of the Northwest Division of El Paso after December 31, 1959, that is, after the date of the asset merger—[fol. 609-898] and the Northwest Division, bear in mind, is what was formerly Pacific Northwest Pipeline Corporation—that their consumption equalled 832 billion cubic feet of natural gas, and that the acquisitions of natural gas during that same period, which El Paso proposes to turn over to New Company, totaled 1,177 billion cubic feet. On its face it would therefore appear that New Company would obtain from El Paso more gas than Pacific Northwest had at the time the merger was effected.

However—and perhaps this will tie in our earlier discussion about the Kingsgate gas, your Honor. The record establishes that out of the 1,177 billion cubic feet that El Paso proposes to turn over to New Company 1,020 billion cubic feet represents the Kingsgate gas, which were already gas reserves that belonged to Pacific Northwest prior to the merger date and reported as such to the Federal Power Commission in Pacific Northwest's annual reports to that agency.

In our view the figures are actually as follows: that El Paso contributed 1,177 billion cubic feet, but from that we must subtract the 1,020 billion cubic feet represented by the Kingsgate gas that Pacific Northwest had prior to December 31, 1959. The remainder is 157 billion cubic feet to New Company since the merger. This is the amount that El Paso contributed to New Company, acquired since the merger.

However, when we balance that off against the 832 billion cubic feet consumed during that period, it appears that [fol. 609-899] under the El Paso divestiture plan that New Company would have expended 832 billion, received 157 billion, for a net loss of 675 billion cubic feet of natural gas.

This is a 675 billion cubic feet figure less than Pacific Northwest had at the time of the merger.

We think the figures are close enough to the 600 billion cubic feet that the Government is advocating be added to the amount to be transferred to the New Company to be quite meaningful.

Mr. Boyd testified at Page 190 of the record that any properly managed pipeline company should always be out replenishing its reserves as they are used up. Therefore, when the Government asks that New Company be allocated an additional 600 billion cubic feet of natural gas, all that we are really asking for is that New Company be put into the same position that it occupied prior to the merger.

In a very conservative way we are merely asking to accomplish what El Paso claims any good pipeline management should have done, that is, to replenish the reserves that have been used up.

In a somewhat different tack, but nevertheless related to the question of gas reserves, I would like to make a comment or two with respect to the Rocky Mountain gas, merely to set the record straight. A statement was made in the El Paso brief about the character of the divestiture plan. [fol. 609-900] It appears on Page 2 of the brief El Paso has submitted.

This statement relates to the supplies of Rocky Mountain gas that El Paso proposes to turn over to New Company. The statement is there made that New Company will acquire from El Paso all of its gas reserves north of Ignacio, But this is not true.

Government's Exhibit No. 4, which contains a tabulation that was prepared by El Paso, establishes beyond any question, your Honor, that the company—that is, the El Paso Company—proposes to hold back from New Company large reserves of natural gas located in the Rockies north of Ignacio.

Under the El Paso plan these reserves will be retained by El Paso and not transferred to New Company. And

we would merely like to point out to your Honor that the value of these reserves is quite large.

In terms of wells, the dollar value given by El Paso is $7,166,112; in terms of leases the value is $1,681,169, for a total of $8,847,281.

In addition, computed in terms of net acres that amounts to 220,472.80 net acres.

An interesting feature of the dollar value of these reserves in the Rocky Mountain area that are being retained by El Paso is that they approximate the value of the much wanted Opal gasoline plant which El Paso claims is gener-
[fol. 609-901] ously being assigned to the New Company.

It is noteworthy, your Honor, that these Rocky Mountain gas reserves that are being retained by El Paso were, in large part, although not exclusively, but in large part, acquired after the stock acquisition of Pacific Northwest, and some of these were acquired even after the merger date, December 31, 1959.

None of these properties are being assigned to New Company under the El Paso divestiture plan, regardless of when they were acquired.

Some question was asked, your Honor, in the previous discussion of this same matter whether the Government has any case at all, any case in existence, where property that was created or discovered or added to a merged company after the merger was ordered divested.

There is such a case, your Honor. It has been decided by the United States District Court—I believe it is the Eastern District of Missouri—in a case against Aluminum Company of America.

The facts of that case—by the way, your Honor, the case is cited in our brief on the gas reserve question, that we have already submitted to the Court.

The question revolved around a plant that was constructed after the Aluminum Company of America had acquired Cupples, which was the acquired company, a metal-
[fol. 609-902] fabricating company. The plant was built

in California long after the—some time after the actual merger, yet this new plant was assigned to the divested company under the judgment.

I would like to bring another case to your Honor's attention. And perhaps, in order to do this effectively, I should explain some of the facts of the case. In the case of the United States v. Kennecott Copper Corporation recently decided, decided last year, in the Southern District of New York, Kennecott acquired a fabricator of wire and cable, and the fabricator's name was Okonite.

Okonite was a New Jersey corporation. At the time of the acquisition Kennecott had a wire and cable fabricating plant of its own located in New Jersey, called the Phillipsdale plant.

After Kennecott acquired Okonite, the Okonite of New Jersey Company, they changed the corporate charter to a Delaware charter, and the New Company, Okonite of Delaware, was given the Kennecott wire and cable plant in the Phillipsdale, Rhode Island area.

After trial Judge Dawson ruled that the acquisition was unlawful and ordered divestiture.

After Judge Dawson's recent demise, Judge Ryan, Chief Judge, took the case, and he filed a judgment requiring that Kennecott divest itself of the Okonite of Delaware corporation, and the Okonite of Delaware corporation, your Honor, [fol. 609-903] manifestly includes what we don't even ask for here, property that was Kennecott's before the merger.

We think there is good precedent for the action that we are asking for here, your Honor. As a matter of fact, in that Kennecott case it is my understanding that the defendants have filed a proposed decree in which they envision the possibility of selling the Kennecott wire and cable plant along with the Okonite properties that they themselves acquired.

We think there is nothing novel or different or strange or unusual about what we are asking for here. As I say, this was property owned by the merged company. We are not going back to seek property that was owned before the

company merged, and we think an equitable division should be made.

We will be glad, your Honor, to prepare the brief your Honor requested and do anything else that would tend to facilitate a decision in this matter.

The Court: Well, generally what I have in mind is bringing these things to a conclusion as expeditiously as we can.

If each of you on each of the points we are discussing will pull the record references together and let me have them, I will give you a solution to this very quickly.

Mr. Lipson: Thank you, your Honor.

[fol. 609-904] The Court: Perhaps we ought to fix a time on these things. Maybe we will wait for that until we hear you on the rest of it.

Mr. Lipson: Thank you.

The Court: Go ahead, Mr. Harrison.

Mr. Harrison: May it please the Court, in the course of counsel's presentation upon this issue of reserves, he referred to a memorandum filed in behalf of the Department this morning summarizing the condition of Pacific Northwest at the time of its merger with El Paso and quoted from the decision of the Supreme Court in that respect.

Referring to his quotations from the Supreme Court, counsel notes that it says in its opinion that—referring to Pacific Northwest—"it was authorized to receive large quantities of Canadian gas and to enlarge its system for that purpose. In addition, Pacific Northwest acquired Rocky Mountain reservoirs along its route. At the end of 1957 it had an estimated 3.51 trillion cubic feet of gas reserves owned outright in the San Juan Basin; 1.04 trillion under contract in the San Juan Basin;" one and a half trillion in the Rocky Mountain area; and 2.33 trillion in Canada.

Now, counsel, of course, at the hearings here has at one moment produced witnesses in an attempt to indicate that really Pacific Northwest doesn't have very much in the way of reserves in the San Juan or otherwise, and they have [fol. 609-905] been largely overestimated. But on this par-

ticular occasion counsel quotes from the Supreme Court and otherwise attempts to support the proposition that at the time of the acquisition Pacific Northwest had enormous reserves everywhere, including San Juan Basin.

We will accept either premise, may it please the Court, because the fact is that whatever they then had in respect to reserves, less any depletion and plus quantities which we will presently refer to, are being returned to the New Company, so that, whether they were large reserves or they were small reserves, the New Company gets them all.

So I fail to understand just what the significance of that vacillating argument with reference to what the reserves were or were not has to do with this issue.

Now, it also is said, from the Supreme Court's opinion, that Pacific Northwest tried to go to California and tried to sell to Edison and they got together a tentative contract, which was subsequently superseded by a contract between Edison and El Paso. This, of course, is all in the record.

The fact is, of course, that the whole of the Supreme Court's factual basis was interwound, was intertwined, with this effort of Mr. Fish to go and sell to Edison in southern California.

His proposal in that respect, if the Court will remember [fol. 609-906] —and it is in the record repeatedly—was that if he could get a commitment from the Edison Company for not less than 300 million cubic feet a day, which was the minimum, said Mr. Fish, which could justify his construction of the line to California, he would then attempt to get the gas from Canada—and, in fact, he had a tentative, conditional commitment, he said, from a Canadian source. And, as Mr. Fish said, the minute that that demand dropped below 300 million, that was the end of his proposition, because he couldn't build a line for less.

And he said, "Where I was going to get it was in Canada." And he said, as the testimony shows, that he would not get any gas from San Juan to go to California. As a matter of fact, he didn't have any, may it please the Court.

We are going to file a memorandum which gives the page references, but the Court will recall, before we file the memorandum, that at the time that Mr. Fish was endeavoring to go to California he didn't have any substantial amount of gas available in the San Juan Basin. He had a collection of leasehold interests which involved the expenditure of millions and millions of dollars to develop, and he didn't have the millions and millions of dollars to develop it. So he entered into a contract with El Paso where El Paso loaned him a supply of gas for five years, to be repaid in subsequent years, and thus the pressure of this need for funds to develop San Juan Basin ceased to be [fol. 609-907] the burden of Pacific Northwest that it otherwise would have been.

[fol. 609-908] And so at all times, as the Solicitor General repeatedly said to the Supreme Court in his briefs, it was from Canada that the competition came by way of gas resources.

Now this company, Mr. Fish's company, that was going to come down from Canada, we did not claim it was a failing company, we did not claim it was on the verge of bankruptcy. We did think that it had some difficult financial problems confronting it, and we think it had a long hard row ahead to build adequate income in the market it was attempting to serve, and we think it had enormous financial problems in the development of gas.

This company with a thin equity, less than the 25 per cent which one witness here sought to criticise as the equity of the New Company, told this court that it didn't make any difference to him what the financial condition of Pacific Northwest was at that time, because this project to sell 300 million cubic feet to the Southern California would stand upon its own feet. Once he had the contract of purchase and once he had the source of gas to supply, he could then finance it and obtain such financing as he needed from outside sources and attempt to get a certificate, and that's exactly, of course, what the Supreme Court contemplates that this New Company should likewise be able to do.

It, like Mr. Fish, should have management and zealous, active and energetic controls anxious to compete where a profitable opportunity offers, and if an opportunity in the [fol. 609-909] neighborhood of 300 million cubic feet offers in California in the future, presumably the New Company, like Mr. Fish, if it aspires to serve that demand, will attempt to find a purchaser to commit itself, will attempt to find, I would think from Canada probably, a source of supply and it would then get the financing and then would apply for a certificate. And that is the kind of competition the Supreme Court is talking about.

As the Solicitor General himself said, the competition for future and unfilled segments of demand down the years in the future—and we will presently point out there are no such demands at the present time.

Now I don't quite understand why—at least as it appears to us—that the position of the Government in this hearing and in this proceeding seems to have been converted from an attempt to create a healthy, vital and powerful company to compete in the future gas markets of California or elsewhere, is converted into a crusade to destroy El Paso and to impair its ability to serve its markets in California, I say, without benefit but with detriment to the New Company.

We have here today revealed to us, however, a new expert in the natural gas pipeline industry, and that is Mr. Lipson. We have been told in this court repeatedly that the Department of Justice does not feel that it has any real knowledge of the natural gas industry. Indeed, every [fol. 609-910] proposal we have made has involved long periods of study on that ground. But this morning Mr. Lipson revealed to you his plan to build a pipeline project to California without any evidence in the record, without the testimony of anyone conversant with natural gas pipeline problems, but he undertook all by himself this morning, instead of looking to the record or testifying from the stand, but arguing from the podium as to how this court should at his instance create a new natural gas pipeline

project from San Juan Basin to California to be owned, operated and certificated to the New Company.

Now, in the first place, we cannot consider properly this attempt to excise 600 billion cubic feet of reserves in San Juan Basin from the whole problem that is before this court. While this court is passing upon this immediate issue now, we cannot overlook the fact that it is part of a greater picture. It cannot be torn loose from the proposal of the company which involves contributions to the New Company, nearly 100 million dollars; nearly 50 million dollars by the way of betterments and extensions, plant, and so forth; nine and one-half million dollars in a gasoline plant in Wyoming; three and a half million dollars invested in obtaining producers supplies for Kingsgate, in Canada; 35 million dollars over a total period, including that prior to the merger, in contributions to the San Juan gas supply [fol. 609-911] of New Company, which includes the drilling of the wells, the tie-ins, the gathering facilities, and whatever other things go with the development of a natural gas supply.

And so it must be—we must take a total picture of what the company is attempting to do.

And further than that, we must take the total picture of what is proposed to be done for the New Company with respect to reserves themselves.

If you look back in the record, or you may perhaps recall, your Honor, that Mr. Fish and Pacific Northwest would never have had its supply of Canadian gas at Sumas had not El Paso been willing to guarantee a market for 300 million cubic feet a day, which was in subsequent years converted to 100 million cubic feet a day which El Paso took up until the merger and offers to take when the merger is converted into the separation of the New Company and El Paso.

In addition to that—I am reading from Government's Exhibit 10—"It is proposed to transfer to New Company in excess of a trillion cubic feet of reserves at Kingsgate, it

is proposed to turn over Big Piney, which involves one and a half trillion cubic feet of reserves; other Rocky Mountain resources of 141,000—that would be 141 million—

Mr. Boyd: Billion.

Mr. Harrison: (Continuing) —billion; and San Juan Basin, 285 billion. That covers the period from 1957, when [fol. 609-912] the stock was acquired, until the present time. And at this point I might advert briefly to some of the last comments of counsel in which he undertook to confine his comparisons and his discussions to reserves acquired by El Paso since the merger.

Well, of course, that is not the test period. The question before the court on this subject is not when did El Paso acquire it, but what did El Paso acquire and what is it turning over. And the fact that the reserves represented by the supply at Kingsgate were the result of a contract signed in the name of Pacific Northwest, when it was wholly owned by El Paso, doesn't alter the fact that El Paso then owned Pacific Northwest, and it was El Paso that put up in excess of three million dollars to obtain the supplies from the Canadian producers to make it possible for that gas to come to the United States from Canada through Kingsgate.

It was only because El Paso stood behind Pacific Northwest and guaranteed these producers and the pipeline company and the Canadian authorities a market for that gas that Pacific Northwest was able to obtain it. And, had El Paso not done so, there would have been no Kingsgate gas.

And so, although credit is given to the old management of Pacific Northwest of having found the source of gas and having promoted it, every single act, every single expenditure, which brought about its exportation into the United [fol. 609-913] States through Kingsgate was at the expense and effort of El Paso itself. And, in the last analysis, as the court said, we are giving this gas to the New Company, and, if it were the prudent thing for the benefit of Pacific Northwest to obtain that supply for Pacific Northwest, then that is what El Paso did, and El Paso intends to turn over to the New Company under its proposal that source of gas

supply which it obtained for the purpose of keeping the Pacific Northwest's system in operation and healthy and building up the necessary reserves.

And now we come down to Big Piney. El Paso, to what extent it generated those supplies after 1957 or after 1959 is unimportant. It did explore in that area which has been said by the Solicitor General and the Department of Justice to be a great potential so far as the area is concerned for future gas production. And, having developed that source of supply, it is turning that over to the New Company. And in promoting that source of supply in an area contiguous to the Northwest system it was only doing what good management does: It was protecting the Northwest system so it could serve its markets, so it would continue to acquire supplies to meet its markets in the future and to have an adequate reserve.

And so we end up with El Paso saying, "We will turn over to the New Company a total of three trillion cubic [fol. 609-914] feet of gas reserves."

Counsel wishes to ignore that—I might mention that there are 285 million coming to it out of San Juan itself that was subsequently acquired gas—chooses to ignore that, chooses to take San Juan Basin alone and say, "We, for reasons of our own, however generous your total offer is, for reasons of our own we wish to excise from your resources in San Juan Basin, which were obtained at your cost and by your investment for the purpose of giving us additional supply."

For what? Not for serving the markets of Pacific Northwest, because, if the court pleases, we are taking 100 million cubic feet a day out of Sumas, and we are offering to enter into a five-year contract to relieve the New Company from the burden involved in the necessity of its taking more gas at Kingsgate than it can use in its market.

And so it has more gas than it can use from Canada. It can't use all the gas it is getting from Kingsgate. It can't use its total supply of gas, but it still wants some more. And since it is not to serve any of the markets of the

New Company, any of the Northwest system, all it can do is to impair the necessary reserves to enable El Paso to meet its obligations and commitments to California and its other markets.

Incidentally, in developing—well, I would say, if your [fol. 609-915] Honor please, that counsel has been fairly frank about one thing. He doesn't pretend that the New Company needs it. He doesn't pretend that the company needs it to go out and find a buyer or find a new source of supply. He doesn't contend that it needs it as a backlog of reserves for its own markets. It is simply counsel's thought that he is commissioned by the Supreme Court to himself create a new pipeline project to California, and, to that end, to obtain 600 billion cubic feet of gas supplies of El Paso in the San Juan Basin.

Counsel attributes to that 600 billion cubic feet of gas per day a capacity to deliver 100 million cubic feet a day to market. There is no evidence of this. We have no evidence to offer your Honor upon it, because there was no evidence. We suggest to counsel, however, that he has failed to consider many elements, including deliverability of gas in the field, which would lead to a conclusion that perhaps it would yield, for market purposes, not in excess of 50 million cubic feet a day. And with the necessity of having three million to go to this market that counsel wishes to serve, it is a little hard to see how he is going to do anything but impair the ability of El Paso Natural Gas Company to meet its market commitments with the same deliverability life with respect to its commitments as the New Company will have with respect to its, to-wit, 14 years.

[fol. 609-916] As the record here now shows, the El Paso Natural Gas Company is committed to sell 250 million cubic feet of gas per day in excess of its past supplies being furnished to be delivered to Southern California Companies through a beefed-up line. And, of course, if El Paso were deprived of a substantial portion of its available reserves, it would impair its ability to perform that contract or to satisfy the Federal Power Commission of its

ability to do so. And so, in that respect, it would be a very damaging thing to do to El Paso. And I wish now to point out that, not only would it not benefit the New Company, but it will be of serious damaging effect upon the New Company.

In the first place, there is no market in California to which Mr. Lipson can sell this gas. The Edison Company, which was Mr. Fish's favorite customer, is no longer in the market. The Edison Company—and this record shows it—owns its own gas supplies in Texas, and it is under contract with the Gulf Pacific Company to deliver that gas to Edison in southern California. So Edison is no longer a customer, no longer a customer for Mr. Lipson's favorite project.

In northern California we have Pacific Gas Transmission with a capacity of a billion cubic feet a day, only a portion of which has been filled at the present time, and an announced, declared policy of the Pacific Gas and Electric Company that it will find its own sources of supply and will [fol. 609-917] deal in them only. So northern California is not a customer.

So that leaves only the Southern Companies as the only other customer in the State of California. And if counsel had read more carefully the Rock Springs decision, he would have discovered that it has no immediate need for that gas and that even the 250 million cubic feet which it has contracted for from El Paso is for the future. So we don't have any customer. We don't have any market. We have only the opportunity to compete, which the Supreme Court clearly defined, not supplying the market today, not supplying today's demands, but creating a company in the place of the old Pacific Northwest which will be in a position to compete for new segments of demand in the years ahead.

Now, in the meantime between now and the years ahead the New Company will have no use for this gas, and yet it will have to take and pay—take or pay for the minimum quantities required. And whether it be 50 million cubic feet

a day or 100 million cubic feet a day the New Company is going to have to find the money to pay for it, and no place to sell it.

Without undertaking to speculate upon how much money would be required to hold these resources, you might say on stand by, until such time as a successful project can be put together, a market in California found, the project certificated, and delivery commenced, I would suggest that [fol. 609-918] the New Company might be in very serious financial straits.

I suggest to your Honor that there is no evidence to support this. I suggest to you that this record shows no way in which the New Company could absorb this financial load, and all of the exhibits and testimony respecting the financial condition of the New Company would be completely set aside and invalidated if this were done, because, obviously, its net revenues would be reduced. Obviously its cash flow would be changed. Obviously its capital structure would be altered. And therefore all the premises of the testimony up to the present time, all of the premises upon which the testimony has been produced, that is to say, the proposed plan of divestiture, might as well be discarded and we start all over.

It is a little bit hard to understand that—I withdraw that a minute.

I wish to proceed a little further about this plan to go to California. Counsel came up with a proposal that Colorado Interstate Gas Company could join with the New Company and carry through this plan to go to California. Of course, we still would need a customer. We still would need a market. We would still need a feasible project and certification. But all he is telling you about is a plan that was put before the Federal Power Commission and was rejected as infeasible, for, in the Rock Springs case, which, incidentally, took five years, may it please the Court, before [fol. 609-919] it was decided, it was held that exactly that plan was infeasible, and it was rejected. And that, of course, was a plan predominantly of the Colorado Inter-

state Gas Company, but in its inception it did rely upon 100 million cubic feet a day to come from Kingsgate, even though in the last analysis it was said by the trial examiner that the supplies would come out of the general resources of El Paso. So I say it is a little bit difficult to understand counsel's attempting to renew a project which has already been tried and started. And when it was tried, may it please the Court, El Paso and Pacific Northwest were one. It tried it with all of the combined resources of both companies and Colorado Interstate, and they got nowhere before the Federal Power Commission. So I hardly think there would be much prospect of counsel's plan succeeding in the early future.

So I say to you, may it please the Court, that, No. 1, counsel even himself, without evidence, without support in the record, has been unable to come up with a project to California, even if this court were willing to take from El Paso the reserves which it has acquired with its own capital for the purpose of protecting its own markets and its own commitments.

Now, there is no contention that I know that has been made in the course of this discussion that the New Company is itself not adequately provided for with the three [fol. 609-920] trillion additional resources in the way of gas to be turned over by El Paso. There is no claim that it will not have enough gas to be a strong, healthy, viable company, able to serve its markets. There is no real contention made that in the total they haven't got all they can use and more. There is simply the claim that somehow, if they could cut 600 million cubic feet of gas—600 billion cubic feet of gas—out of the San Juan reserves of El Paso, El Paso might be unable to fulfill its commitments, its deliverability life would drop below 14 years, and the New Company would be prosperous enough perhaps at some future date to use that to contribute to a California project.

We think that justifies no favorable consideration by the court.

Now, there is one other thing I would like to call attention to about this 600 billion cubic feet a day as conclusive of the proposition that it is not being asked for for the purpose of supporting the New Company's business.

As the undisputed testimony here shows, that gas can't be moved north to the existing facilities because in the winter time all of those facilities from San Juan to the Northwest are chuck-full, unless they wish to invest some 49 million dollars in new facilities to bring that gas to the Northwest.

What about an attempt to do so? Let's look at this [fol. 609-921] question of prices.

Counsel at one point in his argument referred to San Juan gas as the cheapest gas. It all depends, may it please the Court—and the evidence shows this conclusively—where you use the gas.

At the Canadian border, if my recollection of the record is correct, the price at Sumas was 22 cents a cubic foot, but that is at the border. That is for the pipe full of gas ready to deliver and ready to distribute. The cost at Kingsgate was slightly higher than that. I think it was 24 cents.

Mr. Boyd: Twenty-five to 26.

Mr. Harrison: Twenty-five to 26 cents. But again you have a pipeline full of gas being delivered to the system of El Paso, or the New Company, as the case may be, with no additions to your cost except transportation from the border to the near-by markets. That means that your Sumas gas is the cheapest gas in the Northwest, and that means that Kingsgate is the next cheapest.

And now the next nearest to the Northwest is Big Piney. And the most expensive is San Juan gas. You can't get it there if you get it. But if you could get it, sure, you pay 14½ cents at the well mouth, but you pay six and a quarter cents to gather it, and you still haven't processed it. [fol. 609-922] By the time you transport that gas to the Northwest, you have the most expensive gas of all to the New Company.

And so again I say, of course, they don't want it for their own purposes. They simply want it to impair the ability of El Paso to serve its California and Southwest commitments with the reserves that it has acquired for that purpose, and, in serving those requirements, of course, San Juan gas is the cheapest gas for El Paso, but not for the New Company.

Now, there is another phase of this matter which I think should be mentioned, and that is that this is not merely a contest between the Department of Justice and El Paso. It is not merely a contest between the future interests of El Paso and the New Company, because there is a new—Do you wish me to continue?

The Court: I am going to get that heat turned off a little bit. Up where I sit it gets hotter.

Go ahead.

Mr. Harrison: Because there are other interests involved here besides any of those interests. And we return again to note the fact that the New Company, as well as El Paso, will be serving the public as public service companies and that, when you impose ruinous obligations upon El Paso, or when you impair its reserve gas reserves necessary to support its California-Southwest markets, you increase the [fol. 609-923] cost to the consumer in those areas.

One might hope that if the least of that were to happen you would benefit the consumers in the Northwest and at least they would get some advantage out of this over California and the Southwest. But, in view of the fact that they have to eat this gas, that they have nobody to sell it to, that they are going to have to pay for it whether they use it or not, it is going to hurt everybody.

In the long run then the consumers in the Northwest and the consumers in California and the Southwest will all suffer in the ultimate race by reason of such an impractical and impossible proposal as has been presented to you today for a pipeline project now to California.

I would like to point once more briefly to the decision of the Supreme Court and to the character of competition which it contemplated was being offered when Pacific Northwest was acquired and should be available again when a New Company is formed, and repeat that the theory of the Solicitor General was accepted in full by the Supreme Court. The Supreme Court declared the law to be that, insofar as gas sales commitments had been made and had been certificated by the Federal Power Commission, the sales and the purchases were removed from the area of competition within the meaning of the Federal antitrust laws and that the competition in this industry consisted in [fol. 609-924] awaiting the development of new segments of demand of sufficient size to justify the construction of a new pipeline project to California.

And it is that kind of competition which the Supreme Court contemplated the New Company would be in a position to offer.

I suggest to this Court that, looking upon the resources of Pacific Northwest when it was acquired, looking upon its ability to compete for these future segments, and then turning to the New Company as it is to be created in pursuance of the proposed plan of divestiture, there is not a single respect, not one, in which the New Company is not infinitely stronger, infinitely better able to compete, than Pacific Northwest ever was before its acquisition or ever could have been up to this date.

It is only the ability to compete that the Supreme Court said should exist; and, while, with all deference to the Supreme Court, I think they overestimated the capacity of the old Pacific Northwest, whatever it was, it was but a fraction of the strength of the New Company to offer similar competition.

Now, I would like to summarize what we have offered to do with respect to the New Company by again pointing out that El Paso, which acquired Pacific Northwest for one principal purpose, to get access to the Canadian resources, [fol. 609-925] has now offered to turn over to the New Com-

pany all access to Canada, including not only the British Columbia sources of gas, but Alberta, too, that it has offered to turn over to it everything that it has of a commercial nature north of Durango, that it has offered to transfer to it everything in the way of reserves that is logically located in a manner to appropriately serve the Northwest markets of the New Company, that it has retained not all of the San Juan gas reserves that it has acquired, but most of them it has acquired, because it was necessary also to protect El Paso's markets in California and the Southwest.

Some mention today in the course of counsel's argument was made about a supply which he said we were not turning over at Pinedale. That was the subject of Mr. Boyd's testimony. He stated it had no substantial commercial value, and we would be most happy to turn it over for the company's investment in the source of supply, which the company considers of no value. And I believe there were a few other possible deposits non-connected to any system and of no commercial value. But, essentially, we are turning over everything in the way of gas reserves north of that location, all of the gas reserves logically located in an area advantageous to the New Company. And those reserves which El Paso is retaining are logically located to support its commitments to the California and Southwest markets.

[fol. 609-926] I might mention that in connection with the description of his project this morning Mr. Lipson didn't tell us just what 600 billion cubic feet of gas he wanted. He didn't tell us where it was going to be located.

You will recall the record shows that the principal source of supply and interest of El Paso is in the western side of San Juan Basin, and of the other company, the eastern side.

He didn't tell us what gas he would want to have expropriated to the use of the New Company. He didn't tell us what the New Company offered to pay to El Paso for such

a source of supply. He didn't say whether he wanted it from the eastern side or the western side of the basin.

This, like all the rest of his proposal, is the fanciful concoction of counsel without an ounce of testimony to support it and without the testimony of a single witness whoever built a pipeline or whoever knew how to build one.

Now, a couple of cases were mentioned by counsel. We have already submitted a memorandum which we think squarely supports our contention that it would be a violation of the Constitutional rights of El Paso to expropriate properties it has acquired for its own use and at its own cost.

He referred to the *Alcoa-Cupples* case. That involved a plant that had been built and operated by the Cupples Company, and not by Alcoa, which held the bare legal title. It [fol. 609-927] was therefore treated by the court as an asset of the company to be divested.

The same thing is true of the *Kennecott* case, which involved property owned by the subsidiary which was to be divested.

We are not talking about that. We never vested any of these assets of ours, any of these gas supplies, in Pacific Northwest, and therefore there is no occasion to invoke those cases here.

I might say that I would think the court, in considering this case, would treat it very much as though Pacific Northwest had never disappeared in the merger.

The court will recall that that merger was carried out only after a decision of the Federal Power Commission that it was in the public interest to do so, after having considered, by the way, the so-called antitrust considerations. And that was affirmed by the Court of Appeals. The Supreme Court held, on a procedural question, that it should have been tried before this court instead.

But at least let us say that, not only has this company, even though the acquisition was treated as a violation of Section 7 by the Supreme Court—this company is not in the position of an ordinary Sherman Act violator. There

is no claim, and never was, that there was any harm that actually occurred with respect to competition or that [fol. 609-928] competition was adversely affected by the acquisition at the present time, and the violation of Section 7 is justified only by looking to the possible competition of the future.

In that situation the cases have said more than once that punitive measures should not be adopted by the court in a decree of divestiture. We would think, therefore, that this court would treat the assets which Pacific Northwest turned over to the merged company in the merger as still being owned by Pacific Northwest in a theoretical sense and that that which belongs to Pacific Northwest shall be given it and that which does not shall be retained by El Paso.

We think that is supported by the law, and we think it is supported by every consideration of fairness.

Mr. Lipson: Your Honor, apart from counsel's argument there was no evidence in the record whatever that El Paso will be in any way impaired if a quantity of gas as small as the 600 billion cubic feet of gas we are talking about here is transferred to New Company.

Second, referring to the California market, counsel has intimated that the California market does not exist for New Company. This is a strange statement about a market that is growing at the rate of 200 million cubic feet per day per year, about a market that is currently the subject of hotly contested competitive proceedings where several [fol. 609-929] companies are trying to get in and serve that market, but a market such as the one referred to by the Supreme Court in its opinion in this very case.

With respect to the Northwest markets I am sure that the Northwest authorities appreciate counsel's efforts to keep their consumers from an undue burden that would be imposed on them by the fact of adding 600 billion cubic feet of gas to a company that is serving them, yet this is not the position taken before this court in the motion to intervene by Oregon and Washington Public Utility Com-

missions, which are the authorities and powers to represent the consumer interests. Counsel for El Paso does not represent the consumer interests of the Northwest. They are at odds in this regard.

One other point I would like to make, your Honor, on whether or not the independent Pacific Northwest would have been in a position to acquire this additional Kingsgate gas had it been allowed to remain independent. I refer your Honor to the testimony of Mr. Boyd on Page 35 of the October 19 proceeding in this matter, where he had an opportunity to state that they couldn't, but he refused to take that opportunity. He said he wouldn't be prepared to say that the Pacific Northwest Pipeline Corporation couldn't have gotten this gas on its own. I think everything that we know about the company indicates it most likely could have.

[fol. 609-930] It was the same contract that was negotiated by Pacific Northwest that was actually executed finally by El Paso when it acquired the company.

We think the cases cited by the Government clearly dispose of the issue of whether or not it is proper or improper to apportion the assets acquired and constructed since the date of the merger. It makes no difference that the cases cited dealt with subsidiaries. Here obviously this could not be the case, because there was no subsidiary. There was a merger. To say that a merger somehow gives the Government less power—let me rephrase the statement, your Honor. It would be strange to say that, had Pacific Northwest remained a subsidiary corporation, that there would be a Constitutional right in this court to allocate the post-merger reserves, if they opposed the same thing, the same result, after the asset acquisition has gone through.

Your Honor, the Government would be prepared to submit a memorandum referring to the record on this gas reserve matter in two or three days, if it please the Court.

The Court: Will you do so. All right. You are going to exchange memoranda on this phase of the case.

Now, do you want to move on to the next one?

Mr. Harrison: In other words, if I understand your Honor, we will submit it on exchange of memoranda to the Court.

[fol. 609-931] The Court: Yes, exchange them. If you want to reply to either one of them, you may do so.

Mr. Harrison: No, I don't have any more I want to say orally.

The Court: All right. What I meant: If you want to file a reply memorandum, you may do it. Handle it any way you want to.

Mr. Harrison: I would just as leave file a memorandum concurrently, your Honor.

The Court: What I would like to do is get those as soon as possible. I am prepared to move right along with this matter and get the business done. This is the last time, I suppose, we will be arguing about it. You folks tell me anything you want to, and I will get out an opinion and we will sign an order, and you will be on your way.

All right, now the next question: Whether the proposed contracts between El Paso and New Company relating to Kingsgate gas and gas gathering in the San Juan Basin should be revised in the respects contended for by the Government.

I think before we start on that we will give the court reporter an opportunity to rest a little.

(Recess had.)

[fol. 609-932] The Court: Yes.

Mr. Sabin: Back in 1957, I believe it was, your Honor filed an order allowing Oregon to participate in this case as amicus curiae and, in view of the development subsequent by the Supreme Court, I don't know that that would still be a valid situation.

The Court: I think they reversed you when they reversed me.

Mr. Sabin: I guess so. We were also opposed to the merger at that time.

The Court: Yes.

Mr. Sabin: However, I would at any time be available should you care to hear from the consumer interests with respect to these various questions.

The Court: Thank you very much.

All right, you may proceed in any way you want to.

Mr. Sabin: Excuse me, your Honor. Did you want to hear from me?

The Court: No, sir, not right now at any rate.

All right, which one of you wants to talk to the next point first?

Mr. Lipson: Your Honor, we have no preference as to going first or second.

Mr. Harrison: Go ahead.

The Court: You are the plaintiff. My choice would be [fol. 609-933] not to hear you at all, but I am under a necessity to do it so—

Mr. Lipson: I understand your Honor's remark was made in the sense of levity, but in a serious vein, if your Honor would prefer that these matters be presented to you in written form—

The Court: No, I am proceeding just the way I want to proceed. You go ahead.

Mr. Lipson: Thank you. With respect to the remaining areas of disagreement between the parties, it is difficult for me to understand the logic behind the defendant's position.

The Court: What are you talking to now?

Mr. Lipson: I am talking specifically with reference to the changes in the contracts that the defendants propose, but what I say at this moment applies equally to the other matters as well.

If I understand defendants correctly, they say that this court should put the New Company back in the position that Pacific Northwest occupied prior to the merger. Certainly with respect to the contracts, the Westcoast Transmission stock, the tax loss carryover, and so forth, that is exactly what the Government is seeking to do, and I just can't understand why we are being opposed by the defendant in this regard.

Take the contracts, your Honor. The Government is not [fol. 609-934] asking that any changes be made in the contracts. We are content to have the situation with respect to contracts be made identical with the one that existed at the time Pacific Northwest was acquired by El Paso. The changes that have been made in these contracts are not the changes the Government proposes to make. These are changes that El Paso has made. We are merely saying that the contracts be back the way they were and, if changes have to be made, let them be done in the normal course of business between two adverse parties and under the normal jurisdiction of the Federal Power Commission, that it is an imposition on this court to ask us to make, as part of an antitrust solution, changes in the antitrust relationships between the companies.

This is also true with respect to the other matters I have just mentioned. Let the situation be again as it was at the time of the acquisition.

With respect to the contracts in particularity, your Honor, the El Paso proposal contemplates that the New Company and El Paso will enter into four distinct contracts. Each of these, in a sense, were pre-merger contracts in that either the contracts themselves or ones related to them existed in one form or another prior to the merger.

Two of the contracts are particularly important. What we object to with respect to the contracts is that, in the case of each of these two contracts, the one that El Paso [fol. 609-935] now proposes the court to enter was not a contract that existed at the time of the acquisition. If the contract that El Paso proposes to have entered through these proceedings is a contract that would manifestly be to some disadvantage to New Company in that it would cost them more money, would deprive them of certain attributes of flexibility that would be inherent in the pipeline, these are contracts—the contracts to the extent that they have been changed from the proposals that existed at the time of the merger, or the contracts that existed at the time of the merger, have been changed by El Paso alone, and there

has been nobody to represent the New Company's interest. There has been no adversary party. To the extent that this court adopts the El Paso proposal it would be, in our view, difficult or impossible for an adverse party, even though subsequently created, to step in and alter these contracts, since they would be part of your Honor's decree.

The contracts I am referring to, are the Kingsgate contract and the gathering agreement for the San Juan Basin.

As noted, the changes proposed by El Paso are to New Company's detriment. We don't think it is necessary in any way or appropriate for this court to deal with changes in these pre-existing agreements.

The Court: These didn't exist before the merger?

Mr. Lipson: The gathering agreement existed at the [fol. 609-936] time of the merger. The Kingsgate contract existed as an unexecuted proposal filed by the companies with the Federal Power Commission under an X-5 tariff. They were filed with the Federal Power Commission.

The document filed with the Federal Power Commission relates to the corresponding document in the El Paso proposal under Tab 5 of their Exhibit A. The Tab 5 version is the El Paso modification of the former document. The modification gives New Company an obligation to take the entire amount of gas to be delivered under the Kingsgate agreement at a very high load factor of 90 per cent. This means 135 million cubic feet daily. I refer your Honor to Page 42 of the transcript of the October 19 proceeding.

El Paso concedes, apparently, that forcing the New Company to take that much Canadian gas under so very high a load factor may impose a burden on the New Company. And I refer your Honor at this point to Mr. Boyd's testimony at Page 42 of the transcript.

El Paso therefore proposes to sell some of the gas to New Company for a five-year period, starting with 22 billion cubic feet and working down at the end of five years to six billion cubic feet.

However, under the document that was in existence at the time of the merger and that, while not an executed

contract, was filed by the companies with the Federal Power [fol. 609-937] Commission—and I am referring to this X 5 agreement—the New Company would have had a much more advantageous arrangement, and it would have had an option to take as much of this Canadian gas as it needed for its own system, and El Paso would have been obliged to take the remainder.

Now, this was an agreement that was negotiated among the parties, and, at the time El Paso submitted that agreement, along with the Pacific Northwest people, they were willing to go into that agreement at one time, certainly.

Compared to the agreement El Paso now proposes, the Pacific Northwest X 5 agreement was a much more valuable right, largely because of this 90 per cent load factor that I have referred to.

By forcing the company to take a specified high load factor of this gas, it deprives the Pacific Northwest Pipeline of one of the great advantages that it has.

If you observe on the map, your Honor—and the Supreme Court has remarked to the same thing—you will see that the pipeline runs from the Canadian border, which is a source of gas, to the San Juan Basin, which is a source of gas, and it runs to the Rocky Mountains, which contain several sources of gas. This gives the pipeline a great deal of flexibility as to which gas it will require and tap at which seasons. A pipeline operator could use his skill in tapping different reserves of gas at different times, depending upon [fol. 609-938] cost and availability. But when you impose a requirement on the New Company that it take the Kingsgate gas at a very high load factor, you deprive this pipeline of a built-in flexibility. And we think this is a very serious handicap. And, in view of the fact that there is no indication that the Pacific Northwest Pipeline as an independent would willingly have submitted itself to this kind of an arrangement, we think it would be improper to force it to accept this kind of an arrangement when giving rebirth to it.

With respect to the gathering agreement—I have no desire to go over the details that we have already gone into, both in briefs, your Honor, and in previous argument—I would just like to point out that here again this was an actual contract that was in existence between two adverse parties. Apparently the contract was negotiated at arm's length, provides for a certain price, for certain services. The contract may need renegotiation, but we don't think that we can adequately represent New Company in this renegotiation. There is no person standing before the court here representing the interests of New Company as such in any renegotiation of any contract provisions between it and El Paso. Yet, if we adopt the revised version of the San Juan gathering agreement proposed by El Paso in its decree, again this will be unilaterally imposed on the New Company without a "by your leave" of New Company's management.

[fol. 609-939] To the extent that the Justice Department is an adversary of El Paso in these proceedings, nevertheless we are not the same caliber or kind of adversary that could well represent New Company's interest, and, until some party is present before these proceedings to represent New Company's interests, we don't think it would be desirable to impose contracts or to renegotiate contracts in its behalf, No. 1; and, No. 2, these things can be done with lots of contracts that El Paso has entered into with lots of other pipeline companies. They do not apply to the district court to have the contract changed because time has passed. Similarly, to the extent that El Paso can apply to the Federal Power Commission to have these contracts updated for one reason or another, clearly they would have the right to do so. What we object to is changing the situation that existed.

Again, it is difficult to understand the position adopted by El Paso here. If they think that New Company should be reinstituted with the same rights that it had at the time it was acquired by El Paso, clearly the contracts to which

it is subjected should not be changed unilaterally by the El Paso management.

I think that summarizes the position of the Government with respect to these contract matters, your Honor. We would be here, as in the gas reserve matter, happy, if your Honor desires, to prepare a summary of the evidence keyed [fol. 609-940] to the record.

The Court: Yes, do that.

Mr. Harrison: Treating first the two contracts collectively, the court suppressed me once when counsel insisted upon calling that which is not a contract a contract. However, later on in counsel's discussion he properly characterized one as an unsigned proposal, and so I suppose we can dispose of that with that concession. I have a ticket reference, of course, to this Kingsgate contract, which was an unsigned proposal, according to counsel.

We are not suggesting an unsigned proposal to this court, but, as we address ourselves to Kingsgate, I seem to hear the same voice, but different words, about Kingsgate. The old voice—the same voice with the old words was that this Kingsgate was a great acquisition and that the old Pacific Northwest management must be complimented indeed on discovering this great new source to supply the Pacific Northwest and that El Paso had bloody little to do with it for that matter, and hence, since the old company was entitled to the credit for it all, they should have it all, and they want it, they want it but badly.

They don't like the 90 per cent load factor, but that was written in by the old management, not by El Paso, because it was only the form of agreement which they offered to Westcoast Transmission that ultimately ripened into an [fol. 609-941] importation of gas through Kingsgate at an expenditure of some three million dollars by El Paso.

But now the new words are that, "Well, it is not really such a good deal after all. We like the gas, but we don't like our load factor. It is more than we can eat right now, and so we would like to go back to an unsigned proposal."

Now, this unsigned proposal which is in the record was a document unsigned and filed with the Federal Power Commission in proceedings, I presume looking to the importation of gas—I have forgotten exactly whether that was identified in the evidence—and at that time it was the El Paso Natural Gas Company and its own wholly-owned subsidiary, Pacific Northwest.

Well, you could hardly call that an adversary negotiation. That is surely a one-sided one all right. And what happened was that, since it was obviously in the interest of the Northwest system that this gas be made available, El Paso understood to say that, if necessary, it would provide a market, because, without it, they never could have imported it.

The fact is that that unsigned proposal never ripened into anything. Nothing was ever done about it. And, of course, when the merger occurred, there was no longer any occasion to do anything about it. So nothing was ever done about it.

[fol. 609-942] Now, we might perhaps look with disfavor upon some effort to help the New Company which has too much gas at Kingsgate.

As counsel said, with all the supplies we have given them, the reserves along the line of the pipeline, they have a very flexible system, and they can manipulate the various sources of supply to the greatest possible economy.

[fol. 609-943] Now, this is something, by the way, that New Company is going to get, with this proposal for divestiture. I haven't thought of it in just those words and I'd like to repeat them, because my friend, the new gasline expert, thought of it.

And so he says: "We want to be able to use all of these resources to the utmost advantage of the New Company, and to that end we want an agreement that we can unload on our friends, El Paso, anything we don't want at Kingsgate."

The agreement that he wants us to enter into is summarized in one paragraph, and I'd like to read it to you

and point out to you why we just don't think it would be the right thing to do.

"El Paso agrees to take and purchase from Pacific and Pacific agrees to sell and deliver to El Paso natural gas in daily volume substantially equivalent to those from time to time being received by Pacific from PGT."

That's the whole supply, your Honor. That's the total amount.

"The point of delivery from PGT to be at points of interconnection between the facilities of PGT and Pacific and the facilities of PGT and Pacific in the vicinity of Spokane, Washington; provided, however, and notwithstanding the foregoing, that Pacific shall have the un- [fol. 609-944] restricted right to curtail or interrupt such deliveries with prior notice to El Paso whenever and to the extent in Pacific's sole judgment such curtailment of interruption is required in order that Pacific may satisfy the demands of its other customers for natural gas."

In other words, this places in the hands of New Company the right to dump any and all of the gas received at Kingsgate at prices which would be far in excess of any prices that El Paso would be paying elsewhere for gas by the time it brought it down to where it belongs, without any question on the part of El Paso at all.

This would indeed be a vast advantage to management of New Company, but it would be unconscionable with respect to the rights and interests of El Paso.

It's a kind of a contract that this Court in equity would never give relief for by way of specific performance, because upon its face it is wholly inequitable, wholly onesided. And of course, the reason it's onesided is because when the proposal was written, there was in effect only one company.

Now that there are two companies, to impose such an unconscionable burden upon El Paso is simply unthinkable.

Again, we are confronted with the situation where these additional costs would, I suppose, not only be profitable [fol. 609-945] for the New Company, but beneficial by way of cost to the northwest markets in the immediate vicinity of Canada by providing an opportunity to dump at will expensive gas on California to the southwest; but, however much damage it would do El Paso, that damage ultimately I presume would be passed on to the markets of California and the southwest.

And there again, I think the regulatory feature of the industry in which these companies will be engaged suggests, your Honor, such an inequitable arrangement could never be sustained.

Now, the reason that El Paso offered the contract which it does offer, to take diminishing quantities of gas at the periods of lowest demand to the Northwest is because they, too, realize that the New Company has more gas than its present market will eat; and it denied this offer because it felt in this way over a period of five years that market would be in a condition to absorb all of this gas, and, thereby, the New Company would be protected. And we think that in making that proposal El Paso evidenced a desire in good faith to recognize one of the important problems of the Northwest market and to make fair and adequate provision. But the reply is to impose upon El Paso the unconscionable provisions which I have just mentioned.

I suggest to your Honor that the proposal with the New Company, which in effect gives the New Company certain [fol. 609-946] optional rights, is not only fair and helpful and intended to benefit the New Company in the Northwest market, but that it is overweighted in the direction of the New Company, for it gives the New Company optional rights with respect to all of the commitments made by El Paso.

"New Company shall have the option to have delivered to it by El Paso during the winter months the quantities of gas requested by New Company, provided, however, such quantities so requested shall not exceed the total amount delivered by New Company to El Paso during each such

time period and not in excess during any one day of the maximum daily quantity."

In other words, El Paso agrees to receive what the New Company chooses to sell during the first year of operation 21-million cubic feet of gas per day and the daily—no, no, no, that's not right.

"The first year, a total quantity not to exceed 21 billion cubic feet and a daily quantity of not to exceed 133 million."

And then the second, third, fourth, and fifth years, in progressively diminishing quantities, the company agrees to do likewise.

And option is given to the New Company to take the gas back if it wants, when it needs it, which seems to me a pretty fair, pretty liberal, pretty generous proposal.

[fol. 609-947] And I only say to your Honor that I cannot understand the desire, again, of the United States and the Department of Justice to impose obligations upon El Paso which are totally unnecessary to support the New Company's Northwest services and in this case has no reference to it going to California, if I may say so.

Now, in respect to the San Juan gathering agreement, I would like to point out first to the Court that here there was an agreement all right. That agreement was made between El Paso Natural Gas Company and the old Pacific Northwest Pipeline Company when the latter was in the early stages of its efforts to build its pipeline system and acquire gas supplies. At that time El Paso had extensive gas supplies in the San Juan Basin, chiefly along the western side, and Pacific Northwest Company had acquired substantial leasehold interests along the opposite side of the basin, from various companies who are named in this record, but very largely by Phillips Petroleum Company.

At that time El Paso had a gathering system with respect to its wells, and Pacific Northwest had none. It would have been obviously extremely burdensome for Pacific Northwest to duplicate the facilities of El Paso, and wasteful to do so. And so an agreement was made by which they would operate joint facilities and thus save an enormous sum of money to particularly the Pacific Northwest.

[fol. 609-948] And so they entered into an agreement to gather each other's gas and to make charges in accordance with the quantities received by either from the other; and with respect to the matter of price, they specifically provided that each party should pay the other the amount of 1.375 cents per thousand cubic feet of gas gathered.

However, that agreement recognized that El Paso and Pacific Northwest had no experience in gathering costs under such an arrangement; and so the agreement itself provided that the rate to be fixed from time to time should represent the fair cost of service.

Now, this was at an early stage of the development of Pacific Northwest. It had relatively few wells. As of the time the testimony was given here, the number of wells from which gas was being delivered has increased ten-fold. The distances involved are greater. The nature of the gathering facilities are different. And so such a price being fixed without experience in an agreement providing for fair cost of service to be fixed from time to time is not an agreement applicable today.

Now, that agreement continued in effect until January 1, 1960, when it ceased to exist because of the merger, and it has not existed since.

Thereafter, of course, the gathering went on for the benefit of the merged company just as it had in the past; [fol. 609-949] and the cost of gathering was carried on the books of El Paso Natural Gas Company at actual cost. And the actual cost of gathering at the present time is 6.25 cents per thousand cubic feet, as is shown in the testimony of Mr. Boyd at Page 250 of this record.

The proposal which the company makes is not to serve at 6.25 cents per thousand cubic feet, but to serve at 4.5 cents, which is considerably below the actual cost of service at the present time of performing this function.

This is in anticipation of the probability that a bettering of the load factor over the years to come will cut the price, and thus justify 4.5 cents instead of 6.25 cents.

And as against this, it is proposed that we shall readopt a new agreement, because none has existed since January 1, 1960; and instead of providing for cost of service, provide for 1.375 cents per thousand cubic feet of gas gathered, less than a quarter of actual cost and about a third of the amount proposed by the company.

Now, counsel can't understand why we're not willing to serve at that price. Well, we don't want to serve at that price, because it's confiscatory, and nobody likes to provide services and receive by way of return anywhere from a third to a quarter of what the actual cost of my service is. Most human beings feel that way, I think, and I guess [fol. 609-950] natural gas pipeline doesn't like to do it any more than counsel would like to do it if he had an opportunity to serve under those conditions.

So the reason for our objection is fairly clear. This would not only be an unconscionable imposition upon the company. We think it would be confiscatory, and, therefore, would be depriving it of its property without just compensation.

Now, again, this agreement is not something for the benefit of El Paso. Surely, it benefits El Paso in the sense that it spreads perhaps its cost over a larger amount of gas gathered. Perhaps, therefore, in the main, it reduces its unit cost. I don't know. But the principal beneficiary of this is the one that was the principal beneficiary before the acquisition; that is to say, the predecessor of the New Company.

Now, just as then, it is not well that the New Company should be put to the burden of building its own gathering system, of which I think counsel would agree would be an enormous cost. And counsel at one point points out that as the years go by we're going to have more and more of this gas to be gathered. And of course, we're in a fix. We're having a price of 1.375 per thousand cubic feet. The more thousand cubic feet we gather, the more we lose. And so you take that exhibit of the Government, and you can find [fol. 609-951] out the enormous amount that El Paso will be losing over the next three or four years.

Again, I say, this is less than the fair cost of service. The old contract provided for fair cost of service, with readjustment of that cost from time to time. We only ask that we get somewhat less than the fair cost of service at the present time.

Counsel says: "It's only reasonable that you should readopt that contract, because you can complain to the Federal Power Commission."

Well, I don't know how soon we would get our relief from the Federal Power Commission; but a fellow doesn't like losing this kind of money for any appreciable length of time. And so we think we should not be put in the position of serving without compensation for the benefit of the New Company, hoping that somewhere along the line prospectively we will get something back. That which has been done and paid for, we will never get back.

If the Court fixes an obligation on this company to enter into this contract, we do not think this Court will include in that contract an unconscionable and confiscatory rate for service.

By the way, there is no dispute about this, you know. Nobody has taken the stand, nobody has even said, that our present cost is excessive, our 6.25 cents. Nobody has [fol. 609-952] complained that 4.5 cents is reasonable and just in light of the cost of service involved. Simply that the representative of the United States continues its crusade against El Paso.

Apparently anything he can get away from El Paso is fair game these days; and if he can make El Paso suffer some more, in the form of service for the next few years at confiscatory rates, somebody has benefited. Perhaps the New Company. Perhaps indirectly some of the consumers of the Northwest. Certainly not El Paso, and certainly not the consumers of California and the Southwest. And of course, if the New Company feels that this rate is excessive, it in turn has the right to go to the Commission and ask for a change in the rate. But that is no justification for

saying that we might do so, and upon that excuse impose upon us a confiscatory rate.

I might say that the price which we have suggested is somewhat less than a price recently negotiated between El Paso and Southern Union Pipeline Company. That's an independent company. It's not controlled by El Paso. It's an adversary company. It's arrived at between adversaries and competitors, if you wish. And on the face, therefore, it would seem that it's not unreasonable.

I think the attempt to judge the proposal of El Paso's proposed gathering agreement by conditions which existed in 1934, '5, '6, in a field which was in no sense comparable [fol. 609-953] in its extent, its nature, or its production with that which now exists, and to do so after a period of some four years when no such agreement has been in existence is to reach far in the past for the purpose of oppressing El Paso; and we submit it has no merit.

There is a memorandum which counsel filed. I think we gave copies to you. The background of Pacific Northwest Pipeline Corporation, as it appears in the record, your Honor.

The Court: Very well.

Mr. Harrison: And this includes the testimony of Mr. Fisher and others as to the financial plight and condition of the company with reference to the record.

The Court: Yes.

Mr. Lipson: Your Honor, at some stage in these proceedings I think it's appropriate for the Government to remark that contrary to what counsel has intimated and stated on the record, the Government has absolutely no crusade against El Paso Natural Gas Company. I think it's an unfair accusation against the United States Government. This Government has a duty to enforce the antitrust laws. I would hope we do it fairly and impartially, but I would also hope we do it effectively, your Honor.

With respect to these contract matters, the Department of Justice makes no attempt to lock El Paso into any kind

of agreement that is unreasonable. That is not our purpose [fol. 609-954] or our intent.

With respect to these contracts, all that we ask is that the matter of the contracts be submitted to that agency that Congress has designated—that is, the Federal Power Commission—to occupy this field.

The Court: Well, the whole business is going to be submitted.

Mr. Lipson: Unfortunately, your Honor—and I believe some interveners have made a point of noting it—or, the moving interveners—that there is a great deal of concern, and the Government is somewhat concerned about it, too, that if these contracts are made part of this Court's decree, the Federal Power Commission may be deprived of its normal jurisdiction to examine and reevaluate these contracts.

I don't state that affirmatively as an absolute conclusion, but the question should not be left open, your Honor.

The Court: Well, that might be a very good thing to postpone, along with whether or not we're going to spin off the stock or sell it to somebody or sell some and spin some off, or what not. It might be an appropriate thing to have the Federal Power Commission have a look at it.

Of course, I've got myself back to where we started in 1957. I didn't get far with the idea of letting the Federal Power Commission examine things involved in this proceed- [fol. 609-955] ing. The Court unanimously reversed the Court of Appeals for the District of Columbia and the Federal Power Commission; sent the whole business back here for this divestiture, on the antitrust question.

But I don't see any necessary difficulty about that. Mr. Harrison, it seems to me, spelled out very clearly the fairness of these contracts, both the Kingsgate gas and the Gas contract. Of course, there are questions that the Federal Power Commission wants to look at. Everything we do here they're going to have a look at, except they're not going to pass on the antitrust question; but they're

going to certainly pass on the tariff. And the contracts might have some bearing on that subject. So the consumers up in the Northwest might have some interest in that.

Is there any difficulty about setting up the New Company, choosing an executive head, and the management, applying for a charter, petitioning the F.P.C. for certification at the same time, deferring this question for determination and at the time to decide what to do with the stock? Is there a problem about that? Does anybody suggest that that's not a desirable thing? I suggest that to you, Mr. Lipson. Maybe there is a question that the Federal Power Commission ought to have a look at. Certainly, we ought not to apply the decree—or foreclose that. Any problem about that, Mr. Lipson?

[fol. 609-956] Mr. Lipson: No sir, your Honor. We think that it would be an admirable suggestion, insofar as the part relating only to the contracts. I'd like the record to be clear on that.

The Court: You've got yourself in a little contradictory position here.

Mr. Lipson: We're only talking about the contracts now.

That's our whole position, your Honor. We're not even trying to evaluate the reasonableness or unreasonableness of these contracts. We're merely saying that this is a Federal Power Commission matter, peculiarly so, and they are the people that should be in a position to decide.

The Court: What do you say to that, Mr. Harrison?

Mr. Harrison: Well, if your Honor please, I didn't quite catch that.

The Court: Well, let me say to you that in answer to Mr. Lipson's suggestion that this is a Federal Power Commission question—that is to say, the Kingsgate gas contract and the gas gathering contract of San Juan Basin, under the terms of those contracts, particularly as they might affect the rate and the certification, are primarily F.P.C. questions, and the F.P.C. ought to have an opportunity to pass on those.

In answer to that suggestion, I threw out an idea that [fol. 609-957] maybe, if we're going to postpone the ultimate determination of what to do with the stock, we might at the same time postpone these questions, so as to enable the management to present these to the F.P.C. at the time they present their application for certification.

Mr. Harrison: Well, I don't think that's practicable, your Honor, for this reason. It is necessary that a company be created, that it have to present to the Federal Power Commission in support of its application a proposed going concern, with the statements concerning predicted revenues and cash flow and so forth. The jurisdiction of the Federal Power Commission to alter any rate with respect to gathering, or anything of that sort, will have no effect upon the tariff rates in the Northwest, because under the decree as proposed and as had been agreed in the course of our discussions, we are going to file exactly the same tariffs and have the same rates, so that no consumer is affected in any degree at all by this, pending action by the Commission in the future with respect to any change in rates.

We don't think that the New Company can function without the gathering arrangement. If they wish to withdraw from the Kingsgate arrangement, perhaps they would be willing to consider cancelling the whole thing. We thought —and I think the United States indicated in the past that it wished the New Company protected. And we thought [fol. 609-958] that it's new protection will necessarily require some assistance of Kingsgate, because it had too much gas. We thought it was taken care of. We thought it had to have gathering facilities, and therefore we had to make provision for it.

The only question between us is whether we shall pay less than the cost of service and that this Court shall order us to do so or not. When this matter does come before the Federal Power Commission, it can of its own motion without respect to any action by anyone else have an investigation of rates, and it can of its own motion call up the rates which exist under these contracts.

Now, the Federal Power Commission has, I believe, no jurisdiction over the plan of divestiture.

The Court: Not at all.

Mr. Harrison: But this Court when it fixes those things which go into the necessary elements of creating the New Company, has exercised its function finally. Thereafter, however, in the regulatory processes, the Federal Power Commission can do anything it wants with these rates within the law, subject to review by the Court of Appeals of the United States. And we have that right to go to the Court of Appeals of the United States if we don't agree.

Now, I don't know—I thought I heard counsel say something, but I find it hard to believe. I thought he said something to the effect that if you fix a gathering rate here, that [fol. 609-959] it will lock that rate in and exclude the jurisdiction of the Power Commission. Well, if he said that, what happens to us if you fix a 1.375 rate? We're locked into confiscation for good.

So obviously, we wouldn't suggest to this Court that the rate is immutable.

The contract having once been fixed, provides in its own terms for its adjustment in accordance with the cost of service; and that clause was always in there, and it's in the present one.

Now, as to this same contract as before, may it please the Court, I overlooked one thing that my associates called to my attention. This contract did not exist before. As the evidence shows, it was entered into when the facilities—the resources of Pacific Northwest particularly were much less than they are today. As I have said, they are ten-fold today what they were then. The areas covered are vastly more extensive, and the fields are vastly more complicated.

That agreement which was entered into way back in the early years was confined in its application to the then existing area; and in order to extend it to any greater area, amendment was required. So that if counsel were to write that contract literally here, it wouldn't do them a particle of good.

Now, I submit to the Court that we have throughout, [fol. 609-960] from the very beginning, considered that the features which have been embodied in the plan of divestiture are all part of a proper scheme. And until momentarily ago, I thought that was the position of the Government. We certainly so understood through the eight months of discussion; and we still have—and I repeat again, your Honor—to satisfy our investors. We went to our investors, and we sold them the idea that we had a fair allocation of gas reserves so far as they were concerned. They exercised their experience and professional opinion and agreed that the gas reserves to be assigned to the New Company would adequately secure that portion of the debt to be assigned and that the gas reserves which were retained by El Paso would support its market and secure properly the debt to be retained.

In addition to that, they reviewed this whole plan, and they reviewed the 4.5 cent charge. They reviewed the obligation at Kingsgate, and they reviewed all these matters.

And we were permitted to invite their attention to them, invite their criticism or agreement, by the other party to the suit.

Now, to change the tune and say, "Well, the whole thing was a mistake, and we have to start all over, we've got to go back to all of these investors with these various questions," and lay the whole thing wide open leaves us some- [fol. 609-961] where, I don't know where, your Honor, with reference to this whole plan.

Now, all that counsel is talking about is a rate. I'm sure that whatever decision this Court makes with respect to that rate will not unduly disturb the investors. Whatever this Court decides about the other matters, I feel confident the investors will accept.

But if we're to abandon the whole thing and leave it wide open to go to the Federal Power Commission, then I don't see how they can accept it.

The Court: All right. How long do you want to go along?

Mr. Harrison: It's up to counsel.

The Court: How long do you want to hold today?

Mr. Lipson: I'm sorry, I didn't hear the last part of it, your Honor.

The Court: How long do you want to hold here today? Do you want to proceed further?

Mr. Lipson: At your Honor's pleasure. We'd be content to either proceed further or—

The Court: Are you through with this question?

Mr. Lipson: Yes, your Honor, except that I'd just like to note a representative of the Federal Power Commission is unfortunately not here today; but in the earlier statement made by Mr. Harkaway I believe he stated that the contract [fol. 609-962] matters that we've been discussing are those that the Federal Power Commission are particularly interested in.

The Court: All right. The next one is whether El Paso should be required to donate to New Company its stock in the Westcoast Transmission Company. Do you want to address yourself to that?

Mr. Lipson: Yes, your Honor. But I think that the caption supplied by El Paso to that argument is a misleading one.

The Court: It's self-serving.

Mr. Lipson: It seems like it, your Honor.

This is perhaps the simplest, from a legal viewpoint—

The Court: I understand your point. You don't need to press that.

Mr. Lipson: From a legal viewpoint, this matter of the Westcoast Transmission stock is perhaps the simplest. Basically, this was a property, a liquid asset, held by Pacific Northwest Pipeline Corporation, worth a lot of money. It was a valuable investment. When El Paso acquired Pacific Northwest, it acquired this property, as well as the other properties of Pacific Northwest.

El Paso has taken the position that they've got to return the company in the position that it was at the time of the merger, and yet they won't give this stock back. They won't even give back the corresponding value of the stock. They

[fol. 609-963] propose that the stock of Westcoast Transmission be sold and that the proceeds not be given to New Company that's going to be created and can certainly use the funds, but that El Paso retain it.

Now, the funds involved on an average—

The Court: Well, let's get one thing clear. You're saying that Westcoast Transmission Company belonged to the Pacific Northwest Gas Pipeline Company before this merger. Now, do we start with that premise?

Mr. Lipson: No, your Honor. Twenty-five per cent of the stock in Westcoast Transmission, representing 1,127,750 shares of Westcoast Transmission stock, were owned by Pacific Northwest Pipeline Corporation at the time of the merger.

The Court: Is that all we're talking about?

Mr. Lipson: Yes, your Honor.

The Court: Is that twenty-five per cent?

Mr. Lipson: I don't believe it represents twenty-five per cent any longer.

Mr. Harrison: It was at the time. It's not now, your Honor.

The Court: What is it now?

Mr. Harrison: About eighteen per cent.

The Court: Eighteen per cent. What happened to the other seven per cent?

Mr. Harrison: They issued some more shares, your [fol. 609-964] Honor.

The Court: Now—

Mr. Lipson: I believe the number of shares that are involved at this date represent 1,157,000 shares.

The Court: Well, now, if that's an asset that El Paso got in the merger from the Pacific Northwest, why shouldn't you turn it over to them, Mr. Harrison?

Mr. Harrison: I didn't hear.

The Court: If that, as has just been said, is an asset that belonged to Pacific Northwest at the time of the merger, and that El Paso got it from Pacific Northwest

through the merger, why isn't that an asset we ought to turn over to them?

Mr. Harrison: If your Honor please, may I go back just one step? Counsel stated our position to be that we wanted to restore Pacific Northwest, the old Pacific Northwest Company, as we got it. All I can say is, "God help the Pacific Northwest if we did that only!"

We are contributing from the resources of El Paso Natural Gas Company close to $100 million to the success of the New Company. We can't conceive that ordinarily current assets are divested in a divestiture proceeding.

If, for example, your Honor, this had been—well, let's say the Crown Zellerbach case, and they were ordered to divest the St. Helens Company. They wouldn't divest cash, [fol. 609-965] they wouldn't divest securities, they wouldn't divest bonds. They would divest the business and the operating facilities and plant. There's nothing in the antitrust laws or any of the procedures that require that current assets be disposed of in this manner. Think of the absurdity of selling cash, unless you got cash back, you would simply accomplish nothing.

Now, the question here is whether we are providing the company, which is set up to replace the competitive element created by Pacific Northwest at the time we created it—we think we're doing that—we are contributing large sums of investment, large amounts of investment, which we did not acquire from Pacific Northwest. We are prepared to divest Westcoast, but we need the money, because we are divesting ourselves of enormous amounts of investment in facilities and resources which were never a part of the Pacific Northwest.

Now, when we get a little further along with this, we find we're talking just about money, because it's the position of the Government that we are compelled by some theory, legal theory or legal principle, simply because it was the property of Pacific Northwest to give it back, but Pacific Northwest must sell it—I mean the New Company—must sell it at once and convert it into cash.

And so all that we're doing is giving more cash to the New Company. And I submit with the proposal already [fol. 609-966] made in the properties of the nature and extent which it is proposed to transfer to New Company, investments aggregating nearly $100 million, that the proceeds of the Westcoast Transmission stock, which is all we're talking about, not the stock itself, we should have the opportunity to retain, because we have to operate also, may it please the Court.

In the ordinary situation, if this were an ordinary commercial enterprise, and you had before you this kind of a divestiture, you wouldn't be concerned with whether we turned over to a buyer from outside some stock in a particular company. You would be interested in whether we turned over the operating facilities and the opportunity to do business, because our retention of current assets and cash has nothing to do with the competitive situation of the new enterprise. And so here we're talking only about money. As a matter of fact, counsel argues that it's against antitrust principles for the New Company to have this stock —and so it is against antitrust principles to ever have had it, and it's against antitrust principles for El Paso to have it.

And we offer to divest it, and we need the money.

The Court: Well, now, Mr. Lipson, what in effect Mr. Harrison has said is that in the $100 million assets in value New Company is receiving from El Paso is included more than an equivalent, more cash, to be realized from the sale of this Westcoast Transmission.

[fol. 609-967] Mr. Lipson: I understand that to be his argument. But I think, also, it is only argument, because New Company in addition to getting what is on the asset side of the balance sheet in the sense of the properties that El Paso is referring to, these betterments and so forth, is also going to take on an equivalent amount of liabilities in the form of debt to pay for these things. So New Company is not being made the donor of any gift on El Paso part.

I would also like to address myself to one other thing mentioned by Mr. Harrison, which I find to be a novel statement in antitrust law, and that is that current assets are not subject to divestment in a divestiture proceeding. I must admit I've never considered it before, because I've never heard it ever spoken of before by any court. This is, as I say, a completely novel statement.

When the Supreme Court ordered divestiture in this case, they made no such requirement saying, "Don't divest current assets."

The Court: They didn't say anything about not divesting anything. They said, "Divest."

Mr. Lipson: These shares were part of Pacific Northwest, your Honor; whether the assets were fixed or current, they were properly owned by the company that El Paso acquired. They should be subject to the divestiture proceeding.

[fol. 609-968] The Court: Is there anything further you want to say about that?

Mr. Harrison: Well, yes, your Honor. I have a couple of things I want to say about it. Talking about getting this New Company in the condition that Pacific Northwest was when we took it over, I note here that when we took it over, Pacific Northwest had an indebtedness of $172 million. I don't think the New Company is going to be in any such bad shape as that.

The Court: I understood they were going to take an indebtedness of about—

Mr. Lipson: I believe it's about $180 million that they're going to take under the El Paso agreement.

Mr. Harrison: Well, yes. As against the assets that we received from these people? If your Honor please, what I more particularly wish to say is this. One of the arguments —I hope counsel has abandoned it—was that we would make a profit on this sale. Now, the facts are quite different. I think I mentioned them once before. The market price for the stock is approximately $15 a share. As shown by the prospectus is evidence at the main trial as Govern-

ment's Exhibit 307, El Paso paid $29 a share for the Westcoast stock when they acquired the stock of Pacific Northwest, but it is required for Federal Income Tax purposes to carry those shares at Pacific Northwest's original [fol. 609-969] cost of $5 a share. The result is, if it please the Court, that we're going to suffer a loss of some—it will result in a loss of some $4 million, plus capital gain tax of $2.5 million, or a net loss of $6.5 million.

Now, we've been ordered to divest, may it please the Court, and we are proposing to divest. We are proposing, however, to divest on the market, subject to the approval of this Court.

We do not know why it should be vested in the New Company, which is certainly being vested with assets out of all proportion to the cash value of this stock and is to be converted into cash value according to the proposal of the Government. In other words, New Company is not going to retain it at all. It's simply going over there to be sold. And so all it means is they're getting the proceeds of the stock, instead of our getting it; and we submit that with the proposals we made, the properties we propose to contribute, and the capital we propose to contribute to the New Company, we have more than discharged our obligation to create a strong, energetic, viable company, able to serve the Pacific Northwest and to compete with El Paso or any other natural gas company in business. And we think that's what the decree called for. In fact, we don't think it called for that much.

We think we've gone far, far beyond the minimum that this Court would insist upon in carrying out the mandate [fol. 609-970] of the Supreme Court. We've carried it out in the interest of the public of the Northwest and the interest of El Paso Natural Gas Company and in the interest of getting this case concluded; and we submit that the question is not should it be turned over to New Company, but should it be divested and the proposed decree so provide.

The Court: Very well. Is there anything further on that?

Mr. Lipson: I believe we've made our position on the Westcoast Transmission stock clear, your Honor.

The Court: All right. Then the third one. That's the tax loss carryover.

Mr. Lipson: Would you care to proceed on this one, Mr. Harrison?

Mr. Harrison: It's up to you. I'll play ball as long as you will.

The Court: Maybe you'd rather stop. I guess we're not going to be able to complete this thing tonight, because we're going to have to hold a hearing with respect to the selection of independent management, and that will take a little time, I would suppose.

Mr. Harrison: Yes, it may do.

The Court: Are you prepared to do that tomorrow, say?

Mr. Harrison: Yes, tomorrow morning, we'll be ready [fol. 609-971] at ten o'clock.

The Court: Well, the tax loss carryover matter won't take very much time, one way or the other.

Well, suppose we resume tomorrow morning.

(Whereupon a recess was taken until Thursday, February 4, 1965 at 10:00 a.m.)

[fol. 609-973]

Transcript of Proceedings—February 4, 1965

The Court: Well, let's see, what is the next matter we are going to be talking about? Go ahead, Mr. Lipson.

DISCUSSION BY COUNSEL ON THE QUESTION OF TAX LOSS CARRYOVER AND COMMENTS OF COURT

Mr. Lipson: Yes, sir. With respect to the tax loss carryover during the period 1955 through 1959 Pacific Northwest had a total tax loss carryover of $53,820,698 established by the testimony of Mr. Rowe at Page 199 of the record.

The Court: What year did it make that loss?

Mr. Lipson: Well, the large amount of this tax loss, your Honor, was in part due to the fact that Pacific Northwest had barely commenced its operations at the time and, as a result, the very large initial cost of setting up the new business far exceeded its early sales.

In addition to that, as I would like to explain, the Pacific Northwest Company took an accelerated depreciation and expensed it instead of capitalizing it as they had an option to do. This would tend to increase the stated tax loss. The entire amount of this tax loss was used by El Paso during the intervening years. This is established by the testimony of Mr. Boyd at 254 of the record.

The Court: They would have been crazy if they hadn't, wouldn't they?

Mr. Lipson: No question about that, your Honor. We [fol. 609-974] are talking about—

The Court: The difference between Pacific Northwest and El Paso is that El Paso was making some money as against which they could take that tax loss. Pacific Northwest was not.

Mr. Lipson: Pacific Northwest was making money, your Honor. During the first year of operations, which I believe was the first—the first full year of operations was 1958.

The Court: What sits in my craw all the time is that past or preferred dividend.

Go ahead.

Mr. Lipson: It should be borne in mind at the time Pacific Northwest was acquired by El Paso the company had just about commenced its operations. Under the five-year tax loss carry forward provisions of the Internal Revenue Code El Paso has been able to utilize all their tax losses.

In the preparation of these proceedings El Paso was requested to furnish the amount of the tax losses which could have been utilized by Pacific Northwest had it not been merged into El Paso, and continued as a separate company. El Paso did not do so, but said that the answer to

such questions would depend upon decisions which might have been made but which in fact were never made.

The Court: What are you telling me there? They didn't [fol. 609-975] do what?

Mr. Lipson: We requested information from El Paso. Your Honor directed us at the October 19 proceeding to request any additional information of El Paso that we required. We requested some information with respect to these tax losses, and the reply we received from El Paso was that El Paso could not furnish us the data we requested with respect to the amount of tax losses that could have been utilized by Pacific Northwest. El Paso stated that that would depend upon decisions which might have been made but which in fact were never made, and that various results would have followed from different decisions.

Mr. Harrison: That is the correct answer, your Honor. We did not know of any—we had no way of speculating what the tax situation of Pacific Northwest might have been had it remained separate.

Mr. Lipson: In any event, the taxable income and the degree to which the company could have used these tax losses would have been influenced by Pacific's management decisions as to certain options that were available to them under the Internal Revenue Code. For example—

The Court: What is the use speculating about that now? That is something that didn't take place, and, if it ever were to take place, depends upon, as you say, management decisions about options that were available to them under [fol. 609-976] the revenue laws. Why are we going back into that?

Mr. Lipson: To a large extent these were El Paso's decisions, your Honor.

The Court: Well, after the merger, of course, they were El Paso's decisions.

Mr. Lipson: We think that the company should be—

The Court: When El Paso made those decisions, there wasn't any Pacific Northwest.

Mr. Lipson: Exactly, your Honor, and, giving rebirth to the company, we think that the company should be put in some kind of position as it occupied at the time of the merger, giving it the benefit of whatever allocations could be made of these tax losses. I refer to the decision with respect to the capitalization of—

The Court: But what Pacific would or would not have done with those tax losses is the most speculative thing in this lawsuit. It is a lawsuit full of a lot of speculation. Whether they would have ever had any income against which to take it, whether they would have exercised one option or another, whether a variety of management decisions would have been made in a way that would have been useful in deduction of these tax losses—that is so completely speculative that I don't see how we are going to get into that.

Mr. Lipson: Admittedly we cannot make a definitive conclusion to this.

[fol. 609-977] The Court: The fact of the matter is they had tax losses and not profits, and when El Paso took them over, they took over losses, and El Paso, after the merger, used those losses against their income in computing their taxes, which very properly they might. And, as a matter of fact, anybody with any knowledge of this field knows that sometimes that is why one company acquires another, to acquire their tax losses.

Mr. Lipson: That is exactly so, your Honor, and we think, viewed that way, the tax losses become definite assets that the company owned at the time of the merger.

The Court: But what Pacific specifically would have done with them is a horse of another color, whether they were valuable to Pacific or weren't valuable to Pacific as far as deducting income is concerned, exercising even options. The only reason they were vital to El Paso was that El Paso was making some income against which they could deduct them, and whether or not there would have ever been a situation wherein Pacific could have used them is, in my view, highly dubious.

[fol. 609-978] Mr. Lipson: We've gone into the matter in some detail on Page 23 of the brief the Government submitted on December 4 in these proceedings and we have set out in that brief on that page, your Honor, the manner by which at least a certain share of these tax losses would never have been created had Pacific remained an independent separate corporation.

I don't think it would be appropriate to repeat that matter here; but in any event, in the light of our analysis, in the light of the available information on this, we believe that a reasonable resolution would be the creation of a special reserve, as we've noted in that same brief.

That tax reserve would be equal to 52 per cent of the deductions for interest and taxes which Pacific Northwest took during the years 1956 through 1959, inclusive, with which—capitalized on its books. These amounts total $12,375,123.

This would tend to put the company back into a position that it had at the time of the merger.

Mr. Harrison: There are certain of the remarks which I would like to make respecting this so-called tax loss carry forward, which is a phrase imported from the Internal Revenue Code.

I would like to point out that the last two issues involve substantially the same proposition.

[fol. 609-979] If we will go back again to January 1, 1957, we find that El Paso acquired virtually all of the capital stock of Pacific Northwest, which was a company which then had a total debt of $173 million, as I mentioned yesterday.

We are here today supporting a plan the purpose of which in its totality is to comply with the mandate of the Supreme Court, to correct the effect of the acquisition, and to restore the competitive condition which existed at the time that Pacific Northwest was acquired.

We in furtherance of that end have presented to this Court a proposal which involves a debt of what we call the

New Company of only a little more than the debt of Pacific Northwest when it was acquired; but with assets behind that debt, increased the extent of some $100 million or slightly less, in a better plant, in additional facilities, extensions, and better markets, in a company that will have a business with a certain profit, instead of one then suffering losses, and one with reserves far more adequate than those which P.N.W. owned when it was acquired. All of this is in furtherance of the purpose of fulfilling the mandate of the Supreme Court to correct the antitrust effects of the acquisition. And more, if the Court pleases, than that, we are including in the contributions made by way of assets to the New Company those which clearly would not be embraced with any strict interpretation of the Supreme Court's mandate. And I give the Court just one [fol. 609-980] example at the moment, and that is the Opal gasoline plant. And I add the reserves.

Now, we come down to the last two questions. First, the Westcoast Transmission stock and second this piece of legerdemain called tax loss carry forward, neither of which relates in the remotest degree or extent to the purpose of the decree this Court is going to make.

Neither of them is claimed to have any relationship to the anti-competitive effects of the acquisition. Neither of them is charged by the Department as having any relationship to the restoration of any competitive situation or to the ability of the New Company to serve its markets or to compete.

In the first instance, the Government relies on an arbitrary statement that since P.N.W. owned the Westcoast stock, the New Company must own it.

Now, of course, the Supreme Court didn't direct the creation of the New Company. The Supreme Court didn't even give any consideration to a New Company. It simply ordered divestiture. And at certain stages of this proceeding, the counsel had intimated the desirability of sale of assets, in which case the stock of Westcoast Transmission would be sold by El Paso.

What we do propose is, and there is no question, that the Westcoast Transmission stock shall be divested, but having otherwise provided for the creation of a New Company to satisfy every anti-competitive purpose involved in [fol. 609-981] the decree, we have done all that we should do for the New Company. We have created what is necessary with respect to the New Company and more, and we are entitled to retain this asset, which has no relationship—no relationship in the remotest degree—to the service of the Northwest markets or any competitive effort than any other piece of cash. And it's cash only, because according to the Department, it would not be proper for the New Company to hold the stock.

It would, therefore, be compelled to sell it at once. And, therefore, it simply means the proceeds of the stock, cash, to the New Company instead of El Paso. And no justification has been offered, even in respect to the needs of the New Company, for additional cash. And at the same time, it would contribute only to a distortion to that degree of the total plan which has been proposed here to the prognostication of the capital structure, earnings, and cash flow—the asset which belongs to El Paso. It belongs to El Paso.

El Paso is about to divest, but El Paso is entitled to the proceeds, unless it is necessary that it be transferred to the New Company to further some purpose of the Supreme Court's mandate or this Court's decree. And none has been indicated.

Now, the same thing applies to the so-called tax loss carry forward. I must confess that I have a good deal of [fol. 609-982] difficulty discussing the tax loss carry forward, because I just don't understand how by some sort of verbal legerdemain it could convert losses into profits. I know of no public market for losses or for tax loss carry forward. It isn't an asset. It isn't something you can go and sell on the market. It's simply a provision or the result of a provision contained in the Internal Revenue Code which authorizes any and every tax payer in the computa-

tion of his ultimate tax liability to follow certain rules, one of which is the right to carry forward certain past losses.

Now, when El Paso acquired Pacific Northwest it acquired a company then losing money, a company that had lost money. What the stockholders of Pacific Northwest got in exchange for their shares were shares of El Paso; and so they got the benefit of El Paso's past, current and future earnings, and the combined companies got whatever benefit they could derive under the revenue laws of the United States as a result of losses suffered by Pacific Northwest in the past that result in interest payments which were incurred by El Paso as a result of the acquisition of the properties, and various other judges against income which under the Internal Revenue Code every taxpayer is entitled to resort to in the computation of an ultimate tax.

So beginning January 1, 1957, we had virtually one company, because El Paso owned virtually all of the capital [fol. 609-983] stock of Pacific Northwest, and the former shareholders of Pacific Northwest had gotten their profit out of the transaction in owning shares of El Paso.

And from that time on, consolidated returns were made, until the properties were merged and the corporate merger occurred and ultimate tax liabilities to the Government determined.

Now, the stockholders of former Pacific Northwest and all of the stockholders of El Paso got the benefit, if it was a benefit, of El Paso having the right to make that deduction in computing federal income taxes as well as other deductions. Nobody suffered any loss. Pacific Northwest stockholders were very happy with their El Paso stock. But there was only one taxpayer, and only one tax.

Now, in that situation I find it hard to understand upon what basis the Government can contend that because we paid the United States of America less than we would have paid but for this particular deduction, we must increase the capital assets of the New Company. If there is any connection, may it please the Court, I fail to perceive it.

Now, again I repeat, this has nothing to do with putting the New Company in business. It has nothing to do with enabling the New Company to serve its markets or compete with El Paso or other companies. It has nothing to do with the purpose of the Supreme Court's decision or this Court's [fol. 609-984] decree. It is simply saying: "Ample as the assets of the New Company will be, we have devised a scheme whereby El Paso will contribute additional cash to the treasury of the New Company."

For what purpose? Because of this so-called tax loss carry forward. And if anybody can relate that to the anti-trust laws of the United States, he's a better man than I am, may it please the Court.

Well now, we pass this question. It has no relationship to this case. It has no relationship to the purpose of this decree. It has no relationship to the ability of the New Company to compete. We come down to an analysis of what is this thing?

It happens we've had some cases which we have cited to the Court before which have taken the matter up. We have *Western Pacific Railroad Company* v. *Western Pacific.* I hesitate to cite it or refer to it if the Court please, because our firm represented the losing party here. But the ultimate result of it was that the Court held that in a claim of one affiliated corporation against another for having obtained benefit from the tax loss of that other, there is nothing in the tax code or regulations that a tax saving must or should inure to the benefit of the parent company or the company which has sustained the loss which makes possible the tax saving.

[fol. 609-985] And again in a case against New York Central Railroad Company, in an entirely different aspect of the matter the Court held likewise.

In other words, the tax laws operate upon the taxpayer; and whatever the effect upon the taxpayer is something between the taxpayer and the United States, and it does not concern anyone who does not pay the tax.

I repeat that I fail to see what interest it is that the Department represents here. Does it claim it succeeded to the interests of the old Pacific Northwest stockholders and that somehow they were injured and that somehow or other because of an injury to them there should be an additional capital contribution to the New Company? Pacific Northwest stockholders got their consideration. They got El Paso's stock, which I'm sure they were quite satisfied with.

They couldn't possibly assert a claim; and even if they could, I don't see how the Department of Justice has succeeded to their rights.

Pacific Northwest Pipeline Corporation itself has no claim. It doesn't even exist. And when it was owned 99 per cent, it had no claim. But if it had one, how does the United States Department of Justice succeed to their rights, if they ever had any, which they didn't?

I submit to the Court that this is simply an effort to com- [fol. 609-986] pel El Paso to make additional contributions to the capital of the New Company, despite a showing here affirmatively that El Paso has provided in its plan amply, and more than amply, all that is required to restore the competitive condition which formerly existed before Pacific Northwest was absorbed, and in the absence of the slightest evidence or suggestion in the testimony that the capital of the New Company will not be adequate to that purpose.

And as to Westcoast Transmission stock, it will in any event be divested.

Mr. Lipson: Your Honor, I would just like to make one or two brief comments as to the financial condition of Pacific Northwest, so that the record can be correct on the point.

Under the El Paso plan—I'm referring now to Defendants' Exhibit A—the total assets proposed to be divested amount to $243 million.

Mr. Harrison: Counsel is in error. It's more than that.

Mr. Lipson: Well, the exact figure is $243,264,000. I'm reading from Defendants' Exhibit A, Tab 1, Page 2 of 2.

Mr. Harrison: Counsel is in the areas that he's speaking of—the net is over the gross.

Mr. Lipson: Well, we'll deal with net.

The Court: Oh, let's get together on this before we do anything.

[fol. 609-987] Mr. Lipson: I'm reading from a defendant's exhibit, your Honor.

The Court: Well, they seem to have some differences with you about it. Let's get those resolved before we go ahead. What do you fellows say?

All right. Are you satisfied now?

Mr. Harrison: Well, I don't know that we can quite reconcile our figures, but it's not important this morning.

The Court: All right. Go ahead.

Mr. Lipson: Pursuant to the exchange offer that El Paso made to the stockholders of Pacific Northwest, El Paso acquired by May 31, 1957, 99.8 per cent of the outstanding stock of Pacific Northwest. At that time the consolidated balance sheet of Pacific Northwest and its consolidated subsidiaries showed total assets of $293,014,596, your Honor. The first full year of operation of the Pacific Northwest Pipeline Corporation was 1958. That year it turned a profit, your Honor. I'm referring now to Government Exhibit 309 of the initial trial on the merits of this case.

The Court: What year was this?

Mr. Lipson: 1958.

The Court: How much was the profit?

Mr. Lipson: Net income of Pacific Northwest and its wholly owned subsidiaries for 1958 amounted to $271,651.

The Court: Some profit.

[fol. 609-988] Mr. Lipson: Profits of the company have gone up considerably since. That was, after all, its first operating year, your Honor.

As to the need for cash, I'd like to correct counsel's impressions. The Government does maintain that the company does need additional cash. I thought we brought that out on the first day of these December hearings. If not, I

would like to restate the fact, that this company when it's created will not have enough money to pay its operating personnel. The first thing it will have to do is to go out and get a $5 million bank loan. It will not have enough cash. It will not have the current assets—certainly not the current assets that it had at the time of the acquisition.

At the time of the acquisition I believe the record in this case will substantiate the fact that the company had something in the neighborhood of $36 million in current assets. Current assets of $36,701,761. I'm referring now to Government Exhibit 295 of the trial of this case, Page 48.

The matter of the addition of assets is also relevant to something we've discussed in these hearings before your Honor, and that is with respect to the very high debt ratio. Obviously, the addition of assets on the equity side would lower this very high debt ratio and make it that much more feasible for the company to engage in a real expansion program.

[fol. 609-989] The Court: You don't make any serious contention now, do you, Mr. Lipson, that this company is as bad off as Pacific Northwest was? You don't make any serious contention in opposition to what Mr. Harrison has been telling the Court that this company is infinitely better financed, better equipped, to go out in the market and compete—compete with anybody, compete with El Paso? Are you saying that we're setting up a weak and feeble thing here?

Mr. Lipson: Your Honor, in a certain respect, that is what the Government is saying; and that is with respect to competition for the California market. This company that is being set up under the El Paso proposal is, if I may use the word, straitjacketed to serve the Northwest markets. It is not in any position to serve the California markets.

With respect to an expansion program to the California markets, the company is not as strong as the company had been before. It is not as likely to be able to serve the

California markets as Pacific Northwest was at the time of the acquisition in this case.

The Court: New Company is getting everything in the San Juan Basin that Pacific Northwest had. Everything.

Mr. Lipson: Yes, your Honor, but its commitments in the Northwest markets have increased; and therefore, the available reserves—and we're talking about reserves—that it could expend in a new project, an expansion project, are just not there. There are no longer these available reserves. [fol. 609-990] So with respect to the expansion of its market in California, the company is not in a strong position.

The Court: I don't understand how you could be so far apart, you two gentlemen here, on this point. I swear I don't. Mr. Harrison tells us about tremendous increase in reserves that New Company will have over what Pacific Northwest had.

Mr. Lipson: We've taken issue with him on that score, your Honor.

The Court: You don't think New Company has got more reserves than Pacific Northwest had?

Mr. Lipson: Not as of the date of the merger, your Honor.

The Court: Well, I'll let Mr. Harrison talk to that. You go ahead and finish your statement.

Mr. Lipson: I've completed my statement, thank you, your Honor.

Mr. Harrison: I don't think Mr. Lipson seriously believes that the New Company won't be able to borrow $5 million. His old company, Pacific Northwest, had bank loans of $38 million when we took it over. And I don't know that there's much point in continuing to argue the obvious and say that 3 trillion cubic feet more of gas reserves being contributed by El Paso is not 3 trillion. I don't know what to say about it, your Honor. This is what the record says. [fol. 609-991] The Court: I don't think it's necessary.

Mr. Harrison: Counsel makes some comment that he wants to date his computations, your Honor, from January

1, 1960. I don't think it makes any difference when we got them or how we got them. We got them. And we're turning them over, and it's 3 trillion.

The Court: And, of course, the Court's right in saying that the proposal here is to turn over to New Company everything that Pacific Northwest had down in the San Juan area at the time of that merger?

Mr. Harrison: Plus 285 billion feet subsequently acquired and being turned over, and plus the reserves north of the San Juan Basin.

The Court: And some gathering facilities, too?

Mr. Harrison: There is nearly—well, there's $35 million of gathering facilities, some of which amount would appear as expenses of Pacific Northwest in the first two years; but it would be in excess of $20 to $25 million, in any event, in tie-ins, wells, and gathering facilities.

And, of course, a $1.5 million gasoline plant, which seems to be ignored by counsel for the Government, and $3.5 million dedicated to obtaining supplies in Canada, which seems to be ignored by the Government now.

Counsel says they can't go to California. Now, I just wish to reply once again that the only attempt Pacific [fol. 609-992] Northwest ever made to go to California—it appears in the opinion of the Supreme Court, and your Honor remembers it—was his expedition down to sell gas to Edison in southern California. And he wanted to get a contract for 300 million cubic feet a day, because he said if he got that big a deal, he'd go out and buy the gas in Canada. And he got an additional commitment in Canada to go out and find 300 million cubic feet of gas. And he said in his deposition on file in this Court: "You give me the contract with Edison, and you give me the supplies of Canada, and I'll finance the project." And he didn't care what the condition of P.N.W. was at the time. He didn't care that he had $50 million staring him in the face to improve the resources or to develop the resources in the San Juan Basin, a load that was taken off his back by El Paso's gathering agreement and exchange agreement of gas.

He was going to do it just on his own—Mr. Fish. Now, maybe Mr. Fish is exceptional. The fact of the matter is, counsel conceded that he has to have a 300 million cubic feet a day purchaser. He concedes that he's got all of the access to the enormous resources of Canada, and all of the access to all of the potential of the Rocky Mountain area, and he thinks this company can't finance a contract to supply 300 million cubic feet to California.

So I guess that if Mr. Fish could do it with his company, [fol. 609-993] we can find somebody who could do it much more easily with the New Company.

[fol. 609-994] The Court: Well, what else do we have?

Mr. Harrison: The next is the question of management, your Honor.

Mr. Lipson: Your Honor, on this matter I would like to defer to Mr. Harrison, since it is his agenda. I really don't know what he is referring to specifically by Item No. 4 on the agenda.

The Court: Well, overnight I did some thinking about—as I have been doing quite some months now—about this case.

Your new proposal is to postpone any divestiture of the stock, that is, to postpone the manner of the divestiture of the stock, whether to have a spinoff arrangement or part spinoff and part sold. I am wondering if we ought not just to wind this up. I am pretty clear—I am pretty clear about what I want to do in this case and what I intend to do. I don't mean to say that I don't want you to file those memoranda—I do—on each of these points, both of you. I don't mean to say that I am not going to study them. But we have been talking about this a long time now, and I have read a lot from your memoranda, and we have studied the cases here. We have researched the law about as completely as it can be researched in this area ourselves. I staffed myself for that purpose.

Now, I think the thing to do is just set this up and get the [fol. 609-995] job done. And what I am thinking about doing, without making the decision this morning, but in order

to let you folks understand what is in the Court's mind and what, if you have anything else you want to say, you may address yourselves to.

I am not thinking—perhaps I ought to start with that—I am not thinking of following the Government's proposal, just a sale. I am thinking about some arrangements, and I have some suggestions, some additional suggestions you folks haven't made—I am thinking about an arrangement through which this stock will be spun off with guarantees that you have suggested and perhaps some suggestions of my own. I mention that this morning for the purpose of getting right out in the open and discussing with you whether there is any reason that weighs heavily enough with you in the practical management, ultimate final disposition of this case, why we should defer the determination for the three years that you suggest as to whether we will spin it off or sell it or spin part and sell part.

My notion is that this can be presented to the Supreme Court of the United States in such a way that there isn't going to be any further trouble about this case. I think we can frame a decree here that—with the efforts of everyone—that is a little creative and which will have some guarantees that no one, not even the Department of Justice, [fol. 609-996] can take any real serious objection to. I think a decree can be framed.

Now, what I want to ask you about this morning is: How serious are you about wanting to have a three-year delay in that disposition? Maybe I am not putting it fairly to you when I say: How serious are you in wanting a three-year delay with respect to the determination of that?

Mr. Harrison: I don't think we had in mind, your Honor, deferring it for three years. The provision in the decree of three years is a period within which the divestiture must be made, but it was not our idea that the method of proceeding, or the disposition of the question of what to do with reference to that matter, should be deferred for any such length of time, or any time beyond what seemed reasonable.

The Court: In other words, what you are saying is that you contemplate that we will make that decision now, take a spinoff, but that in a matter of three years the transfers, the conveyances won't be made and the court will retain jurisdiction, and perhaps there will be some review of that in the light of changed circumstances or conditions that might—after the companies are divorced—maybe a whole lot more clear after a period of operation than they are now. That is your notion?

Mr. Harrison: Yes. Well, our thought was, your Honor, [fol. 609-997] that until we are able to make the transfer of the property and until we have a certificate to operate we really have nothing to sell or divest or spinoff and that we can tell then better in the light of then conditions what is the best thing perhaps to do, but we still believe that we should spin it off to our shareholders if that can be done.

We had merely suggested that perhaps the final—

The Court: Pardon me.

Mr. Harrison: We still stand upon our original proposition of wishing to spinoff to stockholders to the extent that we can do so, but we merely suggested this other procedure because we felt so anxious to get the corporation on the road and get going and get a certificate and transfer the properties that we felt perhaps this matter could be deferred if that seemed to be the practical thing to do. But if the Court prefers to proceed to a final decree now, it is perfectly satisfactory to us, your Honor.

The Court: That most recent suggestion we are talking about came out of two weeks of negotiations in Washington, and I wonder whether that wasn't some concession to the Government on that.

Mr. Harrison: Well, I think not, your Honor.

The Court: If it is in that category, I am not interested in it.

Mr. Harrison: No, I think not, your Honor. We have [fol. 609-998] had discussions with the Government, but the Government has never itself agreed to that proposal, al-

though we have presented to them in the past and they have opposed it right along—we have had discussions with them, but we have not arrived at an agreement.

The Court: Now, I mentioned a minute ago the Court might have a suggestion or two.

Of course, all the Supreme Court of the United States is concerned about, all the authors of Section 7 of the Clayton Act are concerned about, is the protection of free competition.

Now, I think I should want to write into this decree a provision that the company, New Company, as well as El Paso, both will be enjoined, and I will retain jurisdiction, and this will be a mandatory injunction if I do it—giving you a suggestion—requiring the companies independent of each other to submit economic data to me, the Court, about your operations, business data, economic data, data bearing on the question of your free competition. And I think I should want to impose that duty upon some person in each company, maybe the chief executive officer, and have the court supervise this thing for a while, for as long a while as the court thinks that might be desirable, for a long enough while that the court thinks it might be helpful in securing the freedom of competition that the court is wor- [fol. 609-999] ried about in these mergers and in these divestitures.

Now, there is a provision in your proposal to place some of the stock in a trust, and that the court would retain jurisdiction of that matter.

We are going to have to discuss how far down the stockholders' list should we want to place stock in trust.

Now, the stock itself is not in trust, as I understand the proposal, for voting rights. The trustee will vote the stock pursuant to supervision and direction of the court.

Now, I think with some such guarantees as those, perhaps as we work this thing out, these notions may be perfected, maybe some of them discarded, but I think we can frame a decree nobody can have any objection to, and I would like to endeavor to do that, set our hand to that.

If we are going to do that, I think the thing to do now is just wrap this up and get the job done, let it go up, let them take a look at it, and end this most uneconomic thing that is going on here.

I don't see how El Paso can operate with this lawsuit and other lawsuits, FPC hearings, and one thing and another, that you have to go through all the time. Sometime, somewhere, in the American economic process there is going to arrive a point at which business is just going to throw up its hands and say, "We quit. It isn't worth the effort."

The investor will say, "Why risk it? I have a million [fol. 609-1000] dollars. I will just salt that down in Government securities. The Government seems to be the principal outfit around here. We won't risk capital any more."

That would be a most unfortunate thing to happen, if any day should arrive where the harassment became so great that businessmen would begin to think in those terms.

So I think we can draft a decree, and we ought to be ingenious enough and resourceful enough to draft it in such a way that no one could object, no one could suggest that for a time there weren't, not just adequate, but conclusively plain and clear protections and guarantees of a competitive market.

I think we have had about all the delay we can stand. I think we have exhausted the conversation, the argument. I think the time has now come for action, and I wish you would get those memoranda to me as soon as you can, because I am prepared to act. And what I may do is set my hand to drafting a decree and discuss it with you folks, get your suggestions. But I will tell you the sale is out, as far as I am concerned, the sale is out. I don't think that is the way to operate this thing, to get an underwriter on Wall Street—and I don't care who it is, and I won't name anybody—into the picture.

How is the court ever going to know who is really the power behind the throne of the purchaser organization. [fol. 609-1001] These people are just names.

We took some evidence the other day about some of the people in, I think it was three groups. I don't know who they are. I don't know whether they are working the plan out for their own account or for somebody else's account, what we are getting into.

If I put this on the block for sale, heaven knows where it would end up, who would have control over it, what, perhaps of vastly greater concern, with much more threat to competition, might have its hand in the pile. I think that would be about as reckless a thing as the court could do. I am going to write a little opinion along those lines.

Now, that Pacific Northwest stock was acquired by El Paso in exchange for El Paso's stock. I wouldn't know, and I don't suppose anyone could find out, how many of those Pacific Northwest stockholders still hold El Paso stock.

One of the clearest things of all to me in this lawsuit is that it would be a very short while—and I would hope we might get some evidence on this, some statistics, some stock exchange, New York Board, data about how fast the stock changes hands.

I observed the last day we were here before this week the El Paso Natural Gas stock was the third highest rated stock on the New York Board. Seventy thousand shares changed hands that day for a price in the neighborhood of [fol. 609-1002] $23.

Well, it is perfectly clear it wouldn't be very long before the New Company stock was no longer in the hands to which it had been spun off. Some people would be holding New Company, some others would be holding El Paso.

If it were possible to get some evidence on that, or any statistics about it, I would like to have it. Maybe some of these investigators—there is always somebody, you know, investigating something and getting statistics up on it, so we ought not to have too much difficulty finding someone. [fol. 609-1003] Well, anyhow, I thought I wanted to say those things to you this morning, and that's sort of a preface to selecting management, because we're going to

have a New Company under that decree, and we're going to have to choose that manager, and I'm prepared now to proceed with that part of the business, of course.

Mr. Lipson: Your Honor, may I offer one comment on what your Honor has just stated?

The Court: Certainly.

Mr. Lipson: I would merely like to observe that in our view the vigorous enforcement of the antitrust laws is the greatest protection that risk capital can have in our economy.

The Court: The greatest what?

Mr. Lipson: Protection that risk capital can have in our economy.

Mr. Harrison: Well, your Honor, I will observe that in, I think, the decree we first filed and in the altered decree there is a provision concerning the selection of the chief executive officer for the New Company. This has been a matter of discussion between the parties, and that provision has been in all of the proposals which have been the subject of discussion.

We have made suggestions. They have not as yet proved [fol. 609-1004] acceptable to the Government. As far as I know, the Government has made none.

We hesitate to present in open Court anybody's name or any group, because we think unless and until some means is provided for resolving our possible differences of opinion, it would be most unfortunate to discuss individual persons.

The Court: Yes—bring them up here so they can make an application for the job this morning and consider his qualifications.

No, I don't think we want to do that.

All right. Are you fellows going to have any suggestions about that?

Mr. Lipson: Your Honor, with respect to management, I'm glad Mr. Harrison made the statement he just completed, because unfortunately on the earlier record there

appears a statement that the Government had stipulated one time with El Paso as to management; and Mr. Harrison just acknowledged that this isn't so.

The Court: Well, I don't know, Mr. Lipson, why you continually try to get into an argument here. Now, you don't have to respond to that, Mr. Harrison. I'll respond to it. We had all kinds of conversation in chambers about that, and that was straightened out. There was an agreement between you with respect to that, but that was con-
[fol. 609-1005] cerning the successful result of your negotiations, and it didn't successfully result, and so there was no commitment, and there isn't any commitment. And that was settled long ago, settled in chambers. I went into it with you, and I don't know why you persist in trying to stir up an argument around here. And I think some of your tactics have been precisely that—and this one is—because you know as well as I know that that was all discussed, laid out as plain as day and settled once and for all. Nobody claims that you've agreed. You haven't agreed on anything. You're totally opposed. And you're entitled to be, if you want. But it doesn't make a very good impression on the Court when he's trying to work something out with folks to have somebody that's just stubbornly not willing to agree on anything.

Now, you may proceed.

Mr. Lipson: With respect, your Honor, to the selection of management for the New Company, in view of your Honor's earlier remarks, I would ask for an opportunity for me to consult with my superiors in Washington by telephone before we proceed.

The Court: About what?

Mr. Lipson: About the matter of—the number 4 of the agenda, the setting of the hearing for selection of independent management.

The Court: The Court wants to make it perfectly clear
[fol. 609-1006] that he would hope that you would both make suggestions about who might be the chief executive officer

of such company we're proposing to set up. We would have as great a variety of those suggestions as you can get, so the Court can exercise a judgment about it. So I invite you to do that.

Now, we'll recess now until 2:00, while you can talk with your people in Washington; and I don't want another two weeks' delay about that while you all go back to Washington and negotiate again, because negotiations have come to an end, as far as the Court is concerned.

(A recess was taken until 2:00 this afternoon.)

[fol. 609-1007] Afternoon Session

The Court: All right, you may proceed.

Mr. Lipson: Your Honor, during the course of the noon recess I have been in contact with my superiors in Washington with respect to the selection of management for the New Company in the context your Honor described this morning.

I am authorized to make the following statement: that, while on appearance the individuals referred to by El Paso may be competent, I have no authority to bind the Government to agree concerning any individual managers of New Company. It is the Government's preference that the ownership of an independent New Company choose its own management. Thank you.

Mr. Harrison: May I ask that the last part of the statement be repeated, your Honor.

Mr. Lipson: I will be happy to repeat it. It is the Government's preference that the ownership of an independent New Company choose its own management.

Mr. Harrison: I am lost, your Honor. There is no New Company, and all we can do is submit the proposal we made as to which the Government seems to have no objection with respect to qualifications or availability, and I submit the matter to the Court.

Mr. Lipson: Your Honor, while I am authorized to [fol. 609-1008] represent the Government, I am not authorized to agree to any kind of arrangement as to new management.

COURT REQUESTS MEMORANDA BE FILED

The Court: After these eight months since the decision of the Supreme Court, that has been rather obvious.

Well, I guess it is up to me, so I will proceed from here.

How much time do you want to submit the memoranda that I asked you for?

Mr. Lipson: Your Honor, as we view it, the memorandum would be a somewhat detailed and full compilation of the record of this trial. It runs in excess of a thousand pages, with many exhibits. I think ten days to two weeks would not be out of line to submit a competent memorandum.

The Court: Mr. Harrison, does that sound all right to you?

Mr. Harrison: Your Honor, we will not require that length of time. I submit the matter.

The Court: Monday the 15th let me have the memoranda.

Mr. Harrison: May we inquire of the Court whether it would be appropriate to endeavor to try to frame a proposed decree, having in mind the remarks of the Court this morning.

The Court: I would appreciate it if you would.

Mr. Harrison: Very well, your Honor. Does your Honor wish to request proposed findings of the parties?

[fol. 609-1009] The Court: Yes. Let's have findings and conclusions.

Mr. Harrison: Are they to be due at the same time?

The Court: No, you don't need to have them at that time. Suit yourself. How much time do you want?

Mr. Harrison: That will be ample time for us.

The Court: All right. Submit them on the 15th. Anything further?

Very well, I will be hearing from you.

(Whereupon an adjournment was taken until Monday, February 15, 1965.)

[fol. 609-1009a] Reporters' Certificate to foregoing transcript (omitted in printing).

[fol. 610]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

Judge Ritter
C 143-57

[Title omitted]

MINUTES—February 3, 1965

This matter came on before the court at 10:00 a.m. for hearing. Jack Louis Lipson, Esq., Lawrence F. Noble, Esq. and William T. Thurman, Esq., United States Attorney, appeared for the plaintiff. Gregory Harrison, Esq., Robert S. Daggett, Esq. and Atherton Phleger, Esq. appeared for defendant, El Paso Natural Gas Company.

The following documents were filed by Mr. Harrison;

(1) Memo in support of El Paso's proposal to expedite divestiture

(2) Proposed decree and El Paso's proposed agenda of questions to be heard by the court.

The following documents were filed by Mr. Lipson;

(1) Plaintiff's memorandum summarizing the condition of Pacific Northwest at the time of its merger with El Paso

(2) Plaintiff's memorandum in opposition to the El Paso proposal to postpone a determination of the ownership of the new company.

Statements of Messrs. Harrison and Lipson were heard.

The hour of noon having arrived, court recessed to 2:00 p.m.

Court reconvened at 2:00 p.m. with counsel and parties as heretofore listed present with the exception of Mr. Thurman.

The questions of allocation of gas reserves and contract matters were discussed by counsel. Counsel were directed to submit their respective memoranda references to the record within a few days.

Mr. Harrison filed a document—Financial conditions of Pacific Northwest Pipelines at the time of its acquisition by El Paso Natural Gas Company.

The hour of adjournment having arrived, court adjourned to Thursday, February 4, 1965 at 10:00 a.m.

FEBRUARY 4, 1965

Hearing resumed at 10:00 a.m. with counsel and parties as heretofore listed present.

The question of tax loss carryover was discussed by counsel. Comments of the court were heard.

[fol. 611] The hour of noon having arrived, court recessed to 2:00 p.m.

Court reconvened at 2:00 p.m. with counsel and parties as heretofore listed present.

Statements of Mr. Lipson were heard.

The court directed that simultaneous memoranda be submitted by the parties by Monday, February 15, 1965. Mr. Harrison also to prepare a proposed amended findings of fact, conclusions of law and decree.

Court adjourned.

hs

cc:

Jack Louis Lipson, Esq., Dept. of Justice, Washington, D. C.

William T. Thurman, Esq., U. S. Attorney, 200 Post Office & Courthouse Building, SLC

Gregory A. Harrison, Esq., 111 Sutter Street, San Francisco, California

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[fol. 611a]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil Action No. C 143-57

[Title omitted]

PLAINTIFF'S MEMORANDUM SUMMARIZING THE CONDITION OF PACIFIC NORTHWEST AT THE TIME OF ITS MERGER WITH EL PASO—Filed February 3, 1965

Larry L. Williams, Jack L. Lipson, Lawrence F. Noble, Attorneys, Department of Justice.

[fol. 611b] This memorandum is submitted in conformance with this Court's order issued January 27, 1965 from the bench that each party prepare a memorandum describing the condition of Pacific Northwest Pipeline Corporation at the time of the merger.

I.

The Supreme Court's Decision

In its decision on the merits of this action the Supreme Court determined certain facts regarding the condition of

[File endorsement omitted]

Pacific Northwest Pipeline Corporation at the time of the merger and the Court made other determinations regarding Pacific Northwest's attempts to compete with El Paso in the California market which are relevant to the subject of this memorandum, *United States* v. *El Paso Natural Gas Co., et al.*, 376 U.S. 651 (1964).

We hereby set out the following verbation extracts from the Supreme Court's decision which furnish conclusive answers to this Court's current inquiry:

1. In 1954, Pacific Northwest received the approval of the Federal Power Commission to construct and operate a pipeline from the San Juan Basin, New Mexico, to the State of Washington, to supply gas to the then unserved Pacific Northwest area. Later it was authorized to receive large quantities of Canadian gas and to enlarge its system for that purpose. In addition, Pacific Northwest acquired Rocky Mountain reservoirs along its route. *At the end of 1957 it had an estimated 3.51 trillion cubic feet of gas reserves owned outright in the San Juan Basin; 1.04 trillion under contract in the San Juan Basin; 1.59 trillion under contract in the Rocky Mountain area; and 2.33 trillion under contract in Canada—8.47 trillion in all. Ibid* 653 (Emphasis supplied).

2. Prior to these 1954 and 1955 agreements [between Pacific Northwest, El Paso and Westcoast Transmission Company] Pacific Northwest had tried to enter the rapidly expanding California market. . . . In 1956 it indeed engaged in negotiations for the sale of natural gas to the Southern California Edison Co. (Edison) . . . Edison wanted a firm contract and, upon being advised that it was El Paso's policy to sell only to distributors, started negotiations with Pacific Northwest in May 1956. . . . In July 1956 they reached [fol. 611c] a tentative agreement. . . . El Paso decided to fight the [Pacific Northwest] plan to the last ditch, and succeeded in getting (through a distributor) a

contract for Edison's needs. Edison's tentative agreement with Pacific Northwest was terminated. Before Edison terminated that agreement with Pacific Northwest, Edison had reached an agreement with El Paso for firm deliveries of gas; and while the original El Paso offer was 40¢ per Mcf, the price dropped to 38¢ per Mcf, then to 34¢ and finally to 30¢. *Thereafter, and while the merger negotiations were pending, Pacific Northwest renewed its efforts to get its gas into California.* *Ibid* 654-55 (Emphasis supplied).

3. Pacific Northwest, though it had no pipeline into California, *is shown by this record to have been a substantial factor in the California market* at the time it was acquired by El Paso. *Ibid* 658 (Emphasis supplied.)

4. Pacific Northwest had proximity to the California market—550 miles distant in Wyoming, even nearer in Idaho, only 250 miles away in Oregon. Moreover, it had enormous reserves in the San Juan Basin, the Rocky Mountains, and western Canada. *Had Pacific Northwest remained independent there can be no doubt it would have sought to exploit its formidable geographical position vis-a-vis California.* *Ibid* 661 (Emphasis supplied.)

5. Pacific Northwest was no feeble, failing company; nor was it inexperienced and lacking in resourcefulness. It was one of two major interstate pipelines serving the trans-Rocky Mountain States; it had raised $250 million for its pipeline that extended 2,500 miles through rugged terrain. It had adequate reserves and managerial skill. It was so strong and militant that it was viewed with concern, and coveted by El Paso. *Ibid* 661-62

II.

Trial Record

The foregoing statements by the Supreme Court conclusively establish that Pacific Northwest had enormous natural gas reserves in the San Juan Basin and elsewhere, that it was a substantial competitive factor in California before it was acquired by El Paso and that in every other respect it was a major and "militant" interstate pipeline. All these observations by the Supreme Court find abundant support in the record of the trial on the merits as shown by the following record references:

a) General Financial and Operating Condition of Pacific Northwest at the time of the merger and years preceding

1. On June 28, 1950, Pacific Northwest filed an application for the original construction and operation of a pipe-[fol. 611d] line to extend from the San Juan Basin to the State of Washington. (GX-2, Merger Hearing, Exhibit No. 220) The Pacific Northwest pipeline was certificated by the Federal Power Commission on June 18, 1954. In May 1955, the initial financing of Pacific Northwest was completed and in June 1955 construction was begun. (GX-299, exhibit 2, pp. 1149-50)

2. At the filing of the complaint in this action, July 22, 1957, defendant Pacific Northwest was engaged in the production, purchase, transportation and sale, in interstate commerce, of natural gas for ultimate public consumption for domestic, commercial, industrial and other uses. Pacific Northwest had constructed and placed in operation approximately 2,300 miles of main and lateral pipe lines, extending from the San Juan Basin in New Mexico through the States of Colorado, Utah, Wyoming, Idaho, Oregon and Washington to a terminus at the Canadian Border. Pacific Northwest produced and purchased natural gas in the San Juan

Basin of New Mexico and southwestern Colorado. Pacific Northwest sold natural gas for resale in Washington, Oregon and Idaho, and also sold directly to certain industrial customers in cities and towns located along the route of its pipe line. Pacific Northwest had contracts to sell natural gas to the Colorado Interstate Gas Company which sold gas in Wyoming and Colorado, and to the Mountain Fuel Supply Company in Utah, which company also purchased gas from Utah Natural Gas Company, a subsidiary of defendant El Paso. As of December 31, 1956, Pacific Northwest had assets of $248,391,826. (El Paso Answer, Paragraph 8; GX-71, Kayser, Merger Hearings, Tr. 53-54)

3. Pacific Northwest, as conceived and constructed, was a unique pipeline system, in that it was connected to American reserves at its southern end and Canadian reserves at its northern end, and gas could flow in any direction to any market. (GX-299, exhibit 2, p. 1170)

4. Pursuant to the Exchange Offer made by El Paso to the stockholders of Pacific Northwest, El Paso acquired by May 31, 1957, 99.8% of the outstanding stock of that corporation. At that time, the consolidated balance sheet of Pacific Northwest and its consolidated subsidiaries showed total assets of $293,014,596. These assets consisted [fol. 611e] of depreciated properties, plant and equipment (at cost) of $243,707,969; investments (at cost) of $7,562,701; current assets of $36,701,761; and deferred debits of $5,042,165. (GX-295, p. 48)

b) Substantial Reserves

5. As of mid-1954 Pacific Northwest had committed to it approximately 320,000 acres of gas producing land in the San Juan Basin, with over 3.4 trillion cubic feet of proven recoverable reserves.

In addition, as of the same time, Pacific Northwest had contracts for gas reserves in the Piceance Creek Field of western Colorado, and the Tip Top Field and the Big Piney

Field in Wyoming, which totaled 560 billion cubic feet of proven reserves.

The total of all reserves under contract to Pacific Northwest, as of mid-1954, was just short of 4 trillion cubic feet. (GX-299, exhibit 1, pp. 666-67)

6. The amounts of proved recoverable natural gas reserves owned by or under domestic contract to Pacific Northwest at August 1, 1956, were as follows: San Juan Basin, 1,037 billion cubic feet (developed) and 2,812 billion cubic feet (undeveloped); other domestic sources (all under contract), 301 billion cubic feet (developed) and 746 billion cubic feet (undeveloped). In addition to the foregoing, Pacific Northwest had at least 2,200 billion cubic feet of natural gas under Canadian contract. (GX-2, Merger Hearing Exhibit No. 3, Proxy Statement, p. 11)

7. As of November 1, 1956, Pacific Northwest had executed long-term gas purchase contracts with 30 producers covering gas reserves in the San Juan Basin of New Mexico and Colorado, the Piceance Creek Field in western Colorado, the Bar-X Field in western Colorado and eastern Utah, the Rangley Field in western Colorado, the Big Piney, Tip Top and Hogsback Fields in southwestern Wyoming. Each of these contracts called for the producer to develop the reserves and deliver the gas to Pacific Northwest at the wellhead or at some other agreed delivery point. (GX-2, Merger Hearing Exhibit No. 3, Proxy Statement, p. 10)

[fol. 611f] 8. As of aJnuary 1, 1957, the gas reserves of Pacific Northwest in the United States were from natural gas wells located in the San Juan Basin and the Rocky Mountain region. El Paso's consulting engineers and geologists estimated Pacific Northwest's reserves in the San Juan Basin to be 4,834 billion cubic feet, 32 percent developed and 68 percent undeveloped; in the Rocky Mountain region, Pacific Northwest's reserves were estimated to be 1,126 billion cubic feet, 36 percent developed and 64 percent undeveloped. On January 1, 1957, there were 384 natural gas wells dedicated to Pacific Northwest. (GX-295, p. 17)

9. At December 31, 1957 the natural gas reserves dedicated to the Pacific Northwest pipeline system aggregated approximately 8.47 trillion cubic feet. Of that total, 3.51 trillion cubic feet were attributable to leasehold interests owned by Pacific Northwest in the San Juan Basin and the remainder was committed to it under long term purchase contracts in various producing areas as follows: San Juan Basin, 1.04 trillion cubic feet; Rocky Mountain area (Colorado, Utah and Wyoming), 1.59 trillion cubic feet; and Canada (Peace River area of British Columbia and Alberta), 2.33 trillion cubic feet. (GX-309, El Paso Annual Report 1957, pp. 18, 19)

10. At the end of 1958, gas reserves dedicated to Pacific Northwest were estimated at approximately 9.7 trillion cubic feet. (GX-309, El Paso Annual Report 1958, p. 20)

[fol. 611g] c) Growing Markets

11. As of November 1, 1956, Pacific Northwest had executed 88 twenty-year gas sales contracts and 24 short-term gas sales contracts with distribution companies, industrial consumers and other interstate pipelines. The aggregate maximum requirements were firm and interruptible loads were estimated on December 21, 1956 to amount to 517,000 Mcf per day during the first year of operations; 684,200 Mcf per day during the second year of operations and 806,200 Mcf per day during the third year of operations. (GX-2, Merger Hearing Exhibit No. 3, Proxy Statement, p. 11)

12. In September 1956, Pacific Northwest commenced making deliveries to a limited extent to utility customers for resale and to industrial customers. On September 17, 1956, Pacific Northwest notified the Federal Power Commission of such sales stating that it considered those present sales to be "during construction" and that it did not consider any part of its pipeline system to be in operation. (GX-2, Merger Hearing No. 3, Proxy Statement, p. 12)

13. 1958 was the first full year in which Pacific Northwest made deliveries of gas through its completed pipeline

system. Average daily deliveries of gas from the system increased to 487,231,000 cubic feet in 1958 as compared with average daily deliveries of 337,069,000 cubic feet in 1957. Net income of Pacific Northwest and its wholly-owned subsidiaries for 1958 amounted to $271,651. (GX-309, El Paso Annual Report 1958, p. 19)

14. The following table, taken from GX-13, shows gas sales and gas operating revenues of Pacific Northwest Pipeline Corporation from 1956 to the date of its merger into El Paso Natural Gas Company.

[fol. 611h]

TABLE 9-a.—*Gas Sales and gas operating revenues of Pacific Northwest Pipeline Corp.*[1] *in the United States, by years, 1956 through 1959*

MMCF OF GAS SOLD[2]

	Sales to Gas Utilities	Industrial Sales	Other Gas Sales	Total Gas Service Sales
1956	N.A.	N.A.	N.A.	14,494
1957	111,970	11,306	[3] 1,173	124,450
1958	133,205	13,316	[3] 712	147,233
1959	147,789	15,235	776	163,800

GAS OPERATING REVENUES

[In thousands of dollars]

	Sales to Gas Utilities	Industrial Sales	Other Gas Sales	Total Gas Service Revenues	Total Gas Operating Rev.
1956	N.A.	N.A.	N.A.	4,096	N.A.
1957	30,758	4,102	140	35,001	37,080
1958	41,403	5,001	95	46,499	48,974
1959	47,261	5,621	112	52,994	56,056

N.A.—Not available.

NOTE—Detail may not always add to total due to rounding.

[1] Excludes sales to El Paso Natural Gas Company.

[2] At 14.73# @ 60° F pressure base.

[3] The sum of the individual states sales differs slightly from the U.S. totals shown here.

Source: 1956, Company's Annual Report to Stockholders, p. 4; 1957-59, Company's Annual Report to FPC; 1957, pp. 73, 77-81; 1958-59, pp. 67, 71-75.

15. The following table, from GX-14, indicates the distribution of Pacific Northwest's natural gas sales by state from 1956 to the date of its merger into El Paso Natural Gas Company:

TABLE 10-A.—*Distribution of natural gas sales[1] of Pacific Northwest Pipeline Corp. by States for the years 1956 through 1959*

MMCF

State	1956 Quantity	1956 Percent distribution	1957 Quantity	1957 Percent distribution	1958 Quantity	1958 Percent distribution	1959 Quantity	1959 Percent distribution
Total United States	14,494	100.0	[2] 124,450	100.0	[2] 147,233	100.0	163,800	100.0
Colorado and Wyoming[3]	N.A.		39,609	31.8	39,502	26.8	40,440	24.7
Idaho	N.A.		10,194	8.2	15,432	10.5	19,080	11.7
New Mexico	N.A.		1,204	1.0	378	0.3	430	0.3
Oregon	N.A.		18,403	14.8	25,057	17.0	29,719	18.1
Utah[4]	N.A.		11,997	9.6	13,823	9.4	14,134	8.6
Washington	N.A.		43,019	34.6	53,028	36.0	59,997	36.6

N.A.—Not available.

[1] Excludes sales of Pacific Northwest Pipeline Corp. to El Paso Natural Gas Company.

[2] The sum of the individual States sales differs slightly from the United States totals shown here.

[3] Colorado and Wyoming are combined because gas sold by pipeline in one state is sometimes distributed in the other.

[4] Pacific's sales to Mountain Fuel Supply Co. at the intersection of the two companies' lines near Green River, Wyoming, for resale by Mountain Fuel in Utah are included in Pacific's Utah sales. See Mountain Fuel's Reports to Stockholders of Record and Reports to FPC—1957 through 1959.

Source: 1956 United States total from Company's Annual Report to Stockholders for year 1956, 1957 through 1959 United States totals from Company's Annual Reports to FPC. State totals computed by adding Utility Sales, Industrial Sales and Other Sales.

[fol. 611i] d) Valuable Investments

16. As of December 21, 1956, Pacific Northwest held 6,664,000 shares of the common stock, constituting approximately 69% of the total common stock issued and outstanding of Northwest Production which was incorporated under the laws of Delaware on May 27, 1955, for the purpose of engaging in the exploration for and the production of oil and gas. Since its organization and until December 21, 1956, the operations of Northwest Production had been limited principally to the acquisition of oil and gas leases in the San Juan Basin in New Mexico and Colorado. As of November 1, 1956, Northwest Production owned leases and options to lease covering approximately 118,000 acres in the San Juan Basin. Of Northwest Production's leases or units in which it had an interest, there had been completed, as commercial producers, 14 Mesa Verde wells and 11 Picture Cliff wells in which Northwest Production's aggregate net interest amounted to 8.5 and 10.25 wells, respectively. (GX-2, Merger Hearing Exhibit No. 3, Proxy Statement, pp. 12-13)

17. As of December 21, 1956, Pacific Northwest owned 49% of the common stock of Phillips Pacific Chemical Company, a Delaware corporation; the remaining 51% was owned by Phillips Petroleum Company. (GX-2, Merger Hearing Exhibit No. 3, Proxy Statement, p. 13)

18. West Coast Investment Corporation was a wholly-owned subsidiary of Pacific Northwest incorporated for the purpose of acquiring and holding stock in other corporations. As of December 21, 1956, West Coast Investment Corporation owned 1,127,750 shares which equaled 25% of the common stock of West Coast Transmission Company, Ltd., a Canadian corporation which was Pacific Northwest's source of Canadian gas. (GX-2, Merger Hearing Exhibit No. 3, Proxy Statement, pp. 13, 33)

[fol. 611j] 19. The investments of Pacific Northwest Pipe Line Corporation in associated companies at August 31, 1956, were as follows (GX-2, Merger Hearing Exhibit No. 3, Proxy Statement, p. 32):

Name	Common Shares Owned	Per Cent of Voting Interest	Investment at Cost
Consolidated (eliminated in consolidated balance sheet)—			
Westcoast Investment Corporation	1,000	100	[a] $5,639,750
Unconsolidated—			
Northwest Production Corporation	6,664,000	69	[b] $6,664,000
Westcoast Transmission Company Limited	1,127,750	25	5,638,750
Phillips Pacific Chemical Company	490	49	[c] 1,472,450
Other			61,500
Total			$13,836,700

[a] Includes advances of $5,638,750 and is equal to underlying book value as shown by the records of the company at August 31, 1956.

[b] Of which $5,664,000 represents the cost to the Company of approximately 70,000 acres of undeveloped oil and gas properties transferred to Northwest Production Corporation in exchange for 5,664,000 shares of that company's common stock (par value of $1 per share). Underlying book value of this investment as shown by the records of the company at August 31, 1956, is $6,711,781.

[c] Includes advances of $1,470,000.

e) Valuable By-Product Business

20. Pacific Northwest was engaged in the extraction of natural gasoline, butane, propane and other refined and extracted products from natural gas which was processed at its plant at Ignacio, Colorado, and various companies in which Pacific Northwest held stock interest were engaged in the extraction of products from natural gas including natural gasoline, butane and propane. (Pacific Northwest Answer, Para. 14)

f) Financial Appraisal

21. The financial market had a high opinion of Pacific Northwest's future as evidenced by a general rise in the price of its common shares—even before El Paso's merger offer in October 1956—as shown by the following chart:

	Common stock of Pacific Northwest			
	Bid prices		Asked prices	
	High	Low	High	Low
1954				
4th Quarter	----	----	----	----
1955				
1st Quarter	----	----	----	----
2nd Quarter	----	----	----	----
3rd Quarter	----	----	----	----
4th Quarter	27¾	22	29¼	23¾
1956				
1st Quarter	29¼	27	30¾	28¼
2nd Quarter	33¾	27	35¾	28½
3rd Quarter	37	32¾	39	34¾
Month of October	38½	31½	40½	33½
November 1-19, 1956	43½	38½	45½	40½
November 19, 1956	41½	41¼	42	41¾

[fol. 611k] 22. There was never any question in the mind of any of the Pacific Northwest officials of the availability of financing, provided the economics of a project were satisfactory. The company's financiers had testified several times before the FPC of their confidence in Pacific Northwest. (GX-302, pp. 16-17)

23. In October 1958, Mr. Ray C. Fish, who had been chief executive officer of Pacific Northwest, testified that Pacific Northwest was a financially sound company. (GX-299, exhibit 2, p. 1205)

24. When Mr. Fish was negotiating for the sale of gas to the California markets, he had no doubt that he could

finance the construction of the line to California. He had discussed the financing with Pacific Northwest's main investment house and they at no time discouraged him in his thinking. (GX-299, exhibit 2, p. 1192) Therefore, when Mr. Fish made offers to supply gas to the Southern Edison Company and to PG&E, he was absolutely sure that he could finance the project. (GX-299, exhibit 2, p. 1193)

g) Pacific Northwest As A Competitive Threat to El Paso

25. The December 11, 1954, tri-party agreement between Pacific Northwest, El Paso and Westcoast Transmission was designed to protect Pacific Northwest's market from competition, to protect El Paso's California market from future competition, and to "result in all parties working together for a common end rather than fighting each other". It was characterized by Pacific Northwest as a "treaty" which would solve the problems confronting the parties. (GX-299, exhibit 244)

26. The delivery of 250 million cubic feet of natural gas per day by Pacific Northwest to El Paso under the December 11, 1954 Gas Purchase Contract resulted from El Paso's desire to project a natural gas pipeline from [fol. 611*l*] Mountain Home, Idaho down to the California border in the proximity of Reno, Nevada and for subsequent sale to the California gas distributor companies at that point. (Boyd, Tr. 472)

27. A contract known as the "Exchange Gas Agreement" between El Paso and Pacific Northwest was executed December 11, 1954. The purpose of the agreement concerned Pacific Northwest's plan to drill wells in the San Juan Basin in order to provide for gas delivery to its customers. At that time El Paso had excess deliverability from its own wells in the San Juan Basin. El Paso proposed that Pacific Northwest Pipeline Corporation defer drilling its own wells in the San Juan Basin and that El Paso deliver

to Pacific Northwest from El Paso's wells 100 million cubic feet of natural gas per day for three years; 60 million cubic feet of natural gas per day for the 4th year, and 40 million cubic feet of natural gas per day for the 5th year. Then after a hiatus of two years, and at the end of the seven year period, Pacific Northwest would commence repaying the gas to El Paso. (Boyd,Tr. 475-476)

28. In August 1955, El Paso entered into another contract with Pacific Northwest under which the earlier contract of December 11, 1954 calling for the purchase of 250 million cubic feet of gas per day delivered at Mountain Home, was modified. Under the modification, El Paso took 50 million cubic feet firm gas, delivered on an exchange basis at Ignacio, Colorado and gave to Pacific Northwest [fol. 611m] the right to require El Paso to take another 50 million feet at that point. This contract superseded the older contract of December 11, 1954 involving the delivery of 250 million cubic feet of gas per day at Mountain Home. (GX-71, Kayser, Merger Hearing, Tr. 56, 57)

29. With respect to the Mountain Home Project, the 250 million cubic feet per day that was to be taken by El Paso from Pacific Northwest was to be divided between Pacific Gas and Electric and the Southern California Companies. The pipe line connection was to be made at a point not far from Carson City-Reno area on the California-Nevada Border. Pacific Gas and Electric was to build the pipe line to there which was about 150 miles from the Bay area, and an exchange arrangement was made between Pacific Gas and Electric Company and the Southern California Companies by which the Southern California Companies would obtain their share from P.G. and E.'s lines. (GX-73, Kayser, Merger Hearing, Tr. 1282)

h) The actual and potential competition eliminated in the California markets

A. Pacific Northwest's desire to serve California

30. Even before being certificated by the Federal Power Commission, Pacific Northwest had studied the possibility of transmitting gas to every possible market in California. (GX-299, exhibit 2, pp. 1169-70)

31. In 1954, Pacific Northwest conducted extensive engineering studies regarding the facilities which would be required in order to permit Pacific Northwest to supply gas to California markets. (GX-303)

32. Even prior to its May 7, 1956 meeting with Edison, Pacific Northwest had made studies of the cost of the facilities required to transport gas to the California markets. (GX-117, p. 3)

[fol. 611n] 33. Mr. Silloway, the former president of Pacific Northwest, stated that Mr. Fish wanted very much to ultimately get attached to "the California market"—somewhere down the road he hoped that he (Fish) would attach the Pacific system to the California market. (DX-G, p. 1815)

34. In a memorandum written in June 1955, Ray C. Fish stated "I would like to see the California door open for us [Pacific Northwest] in the future." (GX-299, exhibit 25)

B. Details of the Competition Offered By Pacific Northwest Regarding Sale of Gas to Edison

35. On July 30, 1956, Pacific Northwest and Southern California Edison entered into a preliminary letter agreement providing for a proposed sale of 300 million cubic feet of gas. (GX-299, exhibit 2, p. 1122)

36. In the first part of 1956, Edison was having discussions with Mr. Fish, representing Pacific Northwest, with

regard to the possibility of direct sales of natural gas to Edison by Pacific Northwest. (Kayser, Tr. 248)

37. Pacific Northwest was willing to contract directly with Edison, rather than through a distribution company. (Kayser, Tr. 249-50) El Paso however, had always opposed any pipeline that would come in and take a large industrial user (such as Edison) away from a distributor (such as the Southern California Companies) which was an El Paso customer. (Kayser, Tr. 254)

38. Paul Kayser, as chief executive officer of the El Paso, made an oral offer to sell gas directly to Southern California Edison Company at 40 cents per MCF on August 21, 1956; the price was reduced to 38 cents per MCF in a letter dated August 24, 1956, from Mr. Kayser to Mr. Harold Quinton, president of Southern California Edison. (Kayser, Tr. 274; GX-83)

39. During the meeting with Southern California Edison Company officials on August 21, 1956, at which Mr. Paul Kayser first made his offer on behalf of El Paso Natural [fol. 611o] Gas Company to sell gas directly to Edison, Kayser informed Harold Quinton, president of Edison, that he had heard of Edison's proposed project with Ray Fish and Pacific Northwest Pipeline Corporation for a supply of gas. Kayser indicated to Mr. Quinton that he would protest and fight the Edison-Pacific Northwest project to the last ditch. (GX-83 and GX-142, p. 2)

40. When Paul Kayser, chief executive officer of El Paso Natural Gas Company, came to see Harold Quinton of Southern California Edison Company on August 21, 1956, he told Quinton he knew of the deal Edison was working up with Mr. Fish of Pacific Northwest, that he felt he could supply gas to Edison as cheap as anybody else could, that he wanted to hold the market in Southern California and was prepared to supply it, and that he would resist the efforts of anybody else to come in there. (GX-312, Quinton Deposition, pp. 113-114)

41. At a meeting with officials of Southern California Edison Company on the morning of October 2, 1956, Mr. Paul Kayser on behalf of El Paso stated that after giving further consideration to supplying gas to Edison, he could drop the price from 38 cents per MCF to 34 cents per MCF. Mr. Kayser was informed by Edison officials that the 34-cent figure was still too high. Mr. Kayser said he would give the matter further study and come back in the afternoon; in the afternoon Mr. Kayser returned and offered the gas to Edison at 30 cents per MCF. (Quinton, Tr. 309-311; GX-149)

C. Further Offers By Pacific Northwest to Serve California

42. Both Pacific Northwest and El Paso, as separate corporations, "had made the hardest kind of try" to sell gas to the California market. (Kayser, Tr. 242)

43. During the summer of 1956, while El Paso was negotiating for the acquisition of Pacific Northwest, El Paso was aware that Pacific Northwest was endeavoring to enter the California market. (GX-74, Kayser, Merger Hearing, T-1449)

[fol. 611p] 44. On November 5, 1956, just three days prior to the date on which its directors agreed to a stock exchange with El Paso, Pacific Northwest made a firm offer to Pacific Gas and Electric to supply the future requirements of the California market. (GX-299, exhibit 42; exhibit 2, p. 1172)

45. Even after its directors had approved the stock exchange with El Paso, Pacific Northwest continued to deal separately with the California markets. It did so in order to assure that, if its arrangements with El Paso collapsed, it would still have the potential of serving the California market. (GX-299, exhibit 43)

46. Were it not for the merger, Pacific Northwest would have been willing to sell gas to the California market without the cooperation of El Paso. (GX-299, p. 72)

Respectfully submitted

Larry L. Williams, Jack L. Lipson, Lawrence F. Noble, Attorneys, Department of Justice.

[fol. 611q]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil Action No. C 143-57

[Title omitted]

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE EL PASO PROPOSAL TO POSTPONE A DETERMINATION OF THE OWNERSHIP OF NEW COMPANY—Filed February 3, 1965

Larry L. Williams, Jack L. Lipson, Lawrence F. Noble, Attorneys, Department of Justice,

[fol. 611r] Introduction.

This memorandum is submitted in opposition to the defendant El Paso's proposal that this Court postpone for an unspecified period of time its ruling on the disposition of the stock in the pipeline company to be divested in these proceedings. Under the proposal, the Court would first determine which of the merged company's assets are to be divested to form a New Company. Following that the Court would install the management of the New Company, with the advice of El Paso as well as the Plaintiff and others. Further proceedings in this Court would then be

[File endorsement omitted]

postponed while New Company, presumably aided by El Paso, presented its application to the Federal Power Commission. Only after the conclusion of the certification proceedings and any appeals from the Federal Power Commission determination would the question of the ownership of New Company be resolved by the Court.

Argument

1. The El Paso Proposal Is Inconsistent With The Mandate Of The Supreme Court

Any proposal regarding the conduct of these proceedings can be evaluated only in the light of the Supreme Court mandate which necessitated them. That mandate requires this Court to order divestiture "without delay." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964). In our opinion, the defendant's proposal could make it impossible for the Court to comply with that mandate.

There is no way to estimate with any degree of accuracy the length of time which might be involved before a final determination of this matter under the defendant's proposal. The duration of the certification proceedings before the Federal Power Commission is doubtless dependent to some degree on the number of intervenors in that proceeding and the gravity of their objections. Some indication of [fol. 611s] the length of time which could conceivably be involved, however, may be seen from the fact that the original Pacific Northwest Pipeline Corporation, which was incorporated on June 2, 1949 (GX-2, Exhibit No. 3, p. 9), and which filed its application with the Federal Power Commission on June 28, 1950 (GX-2, Exhibit No. 220), was not certificated by the Federal Power Commission until June 18, 1954. Even the most conservative estimate of the effect of the El Paso proposal would therefore lead to the conclusion that there could be a delay of from one to three years before an effective divestiture could be decreed. Obviously, the length of time before divestiture could actually be accomplished would be even greater.

While the order which El Paso would have the Court enter at this time would involve a determination of some matters necessary to a decree of divestiture, it would in no sense be a decree of divestiture itself. The mandate of the Supreme Court *in this case* is not satisfied by the mere incorporation of a New Company, but only by the effective separation of that company from El Paso. The defendant's suggestion that the stock in New Company be held by a trustee during the period that a decision is postponed does not satisfy the requirement for such a separation. Beneficial ownership of that stock would continue to be El Paso's. El Paso would necessarily receive, on ultimate divestiture, the benefit and burdens of any fluctuations in the value of the stock during the indenture period. The El Paso proposal requires a postponement of a decision, not merely on *one* of the issues involved in the divestiture, but on the *ultimate* issue of whether or not there shall be an effective divestiture.

There is no authority for a postponement such as El Paso has recommended here. Those cases in which the District Courts, on remand of a Section 7 case, have ordered divestiture pursuant to a plan to be submitted at a later date [fol. 611t] do not constitute authority for such action in this case. Here, unlike every other divestiture case, the Supreme Court has already taken that initial step and for this Court to merely repeat the Supreme Court's mandate is a meaningless act. The purpose of this proceeding, unlike the initial proceedings on relief in other Section 7 cases, is not to determine *whether* there shall be a divestiture, but rather the manner by which the divestiture, which the Supreme Court ordered, will be accomplished. The Court has received proposals and evidence from each of the parties, and the matter has been fully argued and briefed. The preeminence of this issue has been recognized by counsel for both parties as well as by this Court. While the mandate of the Supreme Court obviously does not require this Court to enter an order without informing itself on

the issues which might be involved, it is equally obvious, we think, that it does not countenance a delay such as that implicit in the El Paso proposal once the facts necessary to a determination of the central issue have been fully presented.

During the course of the proceedings on January 26, a question was raised as to whether New Company can be incorporated prior to determining its assets. It is clear that there would be no legal obstacle to this, since no State appears to require either a description of the assets or a statement of their value as a condition precedent to incorporation. See *Fletcher's Cyclopedia of The Law of Private Corporations,* Vol. 1, Ch. 7.

Under Utah law, for example, there need only be stated the following: the name of the corporation, its duration, the aggregate number of authorized shares and par value of each, a description of the classes of stock and information concerning the rights of stockholders, the principal office of the corporation and the name of its agent for serving process, the number of directors constituting its initial [fol. 611u] board, and the names and addresses of each of its initial directors and of each of its incorporators. *Utah Code Ann.,* 16-10-49, 1953.

Thus, there would be no legal impediment to the creation of New Company in advance of a determination of its assets, thus permitting its representatives to assist in the resolution of that issue.

2. Evaluation of The Competitive Ability of The New Company Is Impossible Without a Determination of Its Ownership.

The object of these proceedings is to set up a successor to Pacific Northwest Pipeline Corporation to occupy a position from which it can compete with El Paso to serve the California market and elsewhere. This Court's determination of which assets are to be assigned to this successor company, the terms of the contracts under which this suc-

cessor will thereafter be obligated, and the ownership of this New Company's common stock are indivisible parts of a single determination.

The Supreme Court has noted that "the key to the whole question of an effective antitrust remedy . . . is the discovery of measures effective to restore competition." *United States* v. *E. I. duPont*, 366 U.S. 316, 326 (1961). Under El Paso's current proposal, the assets to be divested would be identified but it would be impossible to evaluate the New Company's competitive status vis-a-vis El Paso without also knowing the identity of the class of persons who will own and control the New Company. Only when all of these factors are considered together can we make any kind of determination about the New Company's probable competitive position.

Indeed, a determination of the ownership of the New Company stock may be of considerable aid in resolving the issues which El Paso would have the Court decide immediately. The Court has already noted the desirability of having in these proceedings a representative of those interests of the New Company which are adverse to El Paso. [fol. 611v] The representation, both in these proceedings and in those to be held before the Federal Power Commission, of a New Company which is independent of El Paso and its stockholders would do much to insure that the New Company will emerge as a viable independent competitor to El Paso. We cannot safely assume, however, that the interests of the New Company could be adequately represented by an appointed management which would have no financial interest in the New Company and which would be ever mindful of the fact that the stock of New Company would for several years be beneficially owned by El Paso and might thereafter be owned entirely by El Paso's shareholders.

Conclusion

For the foregoing reasons, we believe that defendant's proposal for further delaying a resolution of the ownership

of the successor to Pacific Northwest and for segmenting the decision in this action should be rejected.

Respectfully submitted,

Larry L. Williams, Jack L. Lipson, Lawrence F. Noble, Attorneys, Department of Justice.

February 3, 1965

[fol. 611w]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

Civil Action No. 143-57

[Title omitted]

FINANCIAL CONDITION OF PACIFIC NORTHWEST PIPELINE CORPORATION AT THE TIME OF ITS ACQUISITION BY EL PASO NATURAL GAS COMPANY—Filed February 3, 1965

I.

Background of Pacific Northwest Pipeline Corporation

Pacific Northwest Pipeline Corporation (PNW) was incorporated in 1949 under the laws of the State of Delaware. Thereafter it filed applications with the Federal Power Commission for authorization to construct and operate a pipeline to serve the states of the Pacific Northwest. (R. 121; 294-295; 702; 751-752)

In 1954, PNW received from the Federal Power Commission a certificate for a small-capacity line running from the San Juan Basin in the south to Seattle, Washington in the north (R. 212). It thereupon obtained financing for

[File endorsement omitted]

the project, and construction commenced. (R. 751-752; 702)

[fol. 611x] As originally conceived and certificated, the system relied on San Juan Basin and other Rocky Mountain gas reserves. However, in November of 1955 the Federal Power Commission issued a certificate authorizing PNW to import Canadian gas into its system. (R. 295; 120-121). The Canadian gas was purchased at Sumas at the Canadian border from Westcoast Transmission Company, and the PNW line was extended to Sumas. (R. 734)

At the time of the acquisition by El Paso of the stock of PNW, it had constructed and placed in operation approximately 2,300 miles of lateral and main pipeline. Its main transmission line extended from the San Juan Basin along the western slope of the Rocky Mountains into Oregon and Washington to the Canadian border. It had sources of natural gas in the San Juan Basin in the south and Canadian sources in the north. It also had access to possible Rocky Mountain reserves along its route. (R. 892; 900; 702)

The main transmission line of PNW from the San Juan Basin to the north consisted of, and now consists of, some 721 miles of 22-inch pipeline and some 811 miles of 26-inch pipeline (R. 295-296). This small-diameter transmission line is located between the San Juan Basin and the Pacific Northwest markets and effectively prevents the movement of additional amounts of gas northward. As early as 1958 it was estimated that one-half of the natural gas sold by PNW came from Canadian sources. (R. 324).

[fol. 611y]

II.

Pacific Northwest Market

The Pacific Northwest region had not been served with natural gas before the certification of PNW (R. 907). In that area PNW was faced with vigorous competition from electricity produced from federal and private hydroelectric facilities and also from fuel oil. In order to meet

this competition, it was necessary for PNW to vigorously promote the use of natural gas, and assist in every way possible the distribution companies, who bought natural gas from it and distributed it to the ultimate consumer. Because of this, PNW had to maintain favorable rates, and construct at its own cost laterals into most new markets. (R. 902-903; 734-735)

III.

Financial Condition

The PNW system was conceived by Ray Fish, a contractor, whose construction company constructed the system and by several large producing companies, including Phillips Petroleum Company, Colorado Oil and Gas Corporation, Sinclair Oil Corporation, Skelly Oil Company, the Chicago Corporation and Stanolind Oil and Gas Company, who desired a new market for their San Juan Basin gas. (R. 748-753; 734-735)

The gas resources of PNW in the San Juan Basin consisted primarily of leaseholds which were assigned to it by the aforementioned companies, each of which retained an [fol. 611z] overriding royalty. It was, therefore, necessary for PNW to perform each and every covenant under the leases, such as drilling, payment of standby rentals and the taking of gas, or lose the leases. This placed an enormous financial burden on the company.

For example, the founder of PNW, Mr. Ray Fish, testified:

> "But, then, after we got the certificate, finally, then we were faced with the realistic thing of developing the Basin, I mean of drilling up those reserves, and you could see from thirty, to forty, to fifty million in dollars overnight to drill them, and it was just impossible, I mean, to put our hands on that much money, and to put that much more money into the project of developing reserves when we could get only a trickle

of gas out. In fact, deliverability from the wells was so much lower than we had ever anticipated." (R. 734-735)

At the same time it was discovered that the gas reserves in the San Juan Basin, although substantial, lacked deliverability; that is, the gas did not flow freely from the wells. This necessitated the drillings of more wells, and the addition of new sources of gas. (R. 734-735; 899; 901-905; 910)

At this same time PNW had expended approximately $7 million under take-or-pay gas supply contracts for gas in other areas which it was unable to use. (R. 935)

Because of these financial problems, PNW was unable to offer any inducements to producers in other areas of the Rocky Mountains traversed by its transmission line to develop their potential reserves, and PNW was unable to finance the construction of laterals and gathering facilities to pick up any gas that had been developed along the route of its pipeline. (R. 900; 905-907)

[fol. 611aa] Thus, PNW was in the position of being unable to develop its markets or develop its gas reserves.

Its financial condition was such that in 1957, PNW suffered an operating loss of $2,067,000, in contrast to predicted earnings of $23,700,000 for the years 1957-1959 (rates of return of 5.78%, 8.14% and 8.33% on equity for the years 1957, 1958 and 1959, respectively) upon which PNW was certificated in 1954 and 1955 as an economically feasible project; the approximately $248,000,000 investment in the facilities of PNW earned only $271,651 in 1958, and $3,619,000 in 1959. Thus, the returns for the three-year period were short by about $22 million of the $23.7 million which PNW was expected to show. (R. 893, 894, 895; 925; 525; 521; as to rates of return R. 518, 322, 323). See also Prospectuses dated July 31, 1956, August 28, 1957 and January 8, 1957 which are found at R. 278; 699; 689).

IV.

Conclusion

In summary, Ray Fish may have been able to finance a natural gas transmission system upon the terms stated in his testimony, i.e.:

> "[Ray Fish] why, we most certainly could have financed a line, because any line we would have undertaken would have had to have been economically feasible. Therefore, we could have financed it.
>
> • • •
>
> [fol. 611bb] "I have never entered into a contract that I could not have financed; therefore, I could have financed it . . . ."
>
> • • •
>
> "The type of contract I would have with my customer company would be such that I could finance."

But, even Mr. Fish readily recognized the financial difficulties of PNW, and that additional financing was essential to the survival of the PNW system. (R. 743; 761; 787).

PNW was unable to earn its preferred stock dividend requirements; 80% of its cash generated by depreciation had to be applied to the sinking fund requirements on its bonds, so only its small amount of cash was available for capital expenditures (R. 905), and as stated by Ray Fish, it faced the loss of its leaseholds in the San Juan Basin unless it was prepared to spend $30 million to $50 million.

Respectfully submitted,

Brobeck, Phleger & Harrison, By Gregory A. Harrison.

[fol. 612]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

Judge Ritter

C 143-57

MINUTES—February 9, 1965

On this date, government counsel, Jack Louis Lipson, Esq., in Washington, D. C. and El Paso counsel, Robert S. Daggett, Esq., in San Francisco, on the telephone conference call with Judge Ritter, in which Mr. Daggett requested an additional week's time within which to file the memoranda, proposed findings, conclusions, and divestiture decree.

It Is Ordered that this motion be granted and the time be and is hereby extended from Monday, February 15, 1965 to Tuesday, February 23, 1965.

The time in which government counsel was to file their papers was also extended one week.

cc: Jack Louis Lipson, Esq., Dept. of Justice, Washington, D. C.
William T. Thurman, Esq., U. S. Attorney, 200 Post Office and Courthouse Bldg., SLC
Gregory A. Harrison, Esq., 111 Sutter Street, San Francisco, California
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Arthur H. Dean, Esq., Sullivan and Cromwell, 48 Wall Street, N. Y.
Leon M. Payne, Esq., 2200 Gulf Bldg., Houston 2, Texas
Ray, Quinney and Nebeker, Suite 300, 65 South Main, SLC

[fol. 613]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 19, 1965

I

Notice is hereby given that Cascade Natural Gas Corporation, applicant for intervention in the above-entitled matter, hereby appeals to the Supreme Court of the United States from the final order denying it intervention entered in this action on January 22, 1965.

This appeal is taken pursuant to Section 2 of the Expediting Act of February 11, 1902, 32 Stat. 823, as amended, 15 U. S. Code § 29.

II

The clerk will please prepare a transcript of the record of this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The application of Cascade Natural Gas Corporation for leave to intervene dated October 5, 1964, the supporting Affidavit of A. R. Mitchell and the Certificates of Service [fol. 614] of Richard B. Hooper.

2. Memorandum of Evidence, Law and Argument in Support of Application for Leave to Intervene of Cascade Natural Gas Corporation, including Certificates of Service of Richard B. Hooper and John C. T. Conte and Annexes A and B to said Memorandum and all Exhibits thereto.

[File endorsement omitted]

3. The plan of divestiture proposed by the El Paso Natural Gas Company and filed with the Court on or about October 15, 1964.

4. A copy of that portion of the civil docket in the within proceeding showing all entries made therein on and after April 6, 1964.

The attention of the Clerk is called to the Notices of Appeal heretofore filed herein by the State of California and the State of Oregon ex rel. Public Utility Commissioner of Oregon and to Rule 12 (5) of the Rules of the Supreme Court, Title 28 USCA with respect to duplication of the record.

III

The following questions are presented on this appeal:

1. Whether Appellant, a public utility retailing natural gas in Washington and Oregon, has a right to intervene in this case where the decree of divestiture will impose upon it a new sole supplier of gas and Appellant has shown by unrebutted affidavits that under the form of decree urged upon the trial Court by the Defendant, said new sole supplier will be so constituted as to be substantially less capable of supplying Appellant's long term interruptible gas requirements than the Defendant and its predecessors have been. (Rule 24 (a)(3) Federal Rules of Civil Procedure).

2. Whether Appellant has a right to intervene in this case where the applicable law, the record and Appellant's unrebutted affidavits, show that no present party is a [fol. 615] customer of Defendant, as is Appellant, that no present party will be obliged to be a customer of the new entity to be created by the decree of divestiture and Appellant will be, that the Plaintiff is not shown to be familiar with and is under no duty to protect Appellant's interests and that some of the objectives of the Defendant probably

are adverse to Appellant's interests. (Rule 24 (a)(2), Federal Rules of Civil Procedure.)

Jones, Grey, Kehoe, Hooper & Olsen, By Harry B. Jones, Jr., Attorneys for Cascade Natural Gas Corporation, 1000 Norton Building, Seattle, Washington 98104.

[fol. 616] Proof of Service (omitted in printing).

[fol. 618]

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

Salt Lake City, Utah

February 19, 1965

NOTICE TO COUNSEL THAT NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES WAS FILED BY CASCADE NATURAL GAS CORP.

To:

William T. Thurman, Esq., U. S. Attorney, 200 U. S. Post Office and Courthouse, Salt Lake City, Utah

Jack L. Lipson, Esq., and Larry L. Williams, Esq., Antitrust Division, Department of Justice, Washington 25, D. C.

Gregory A. Harrison, Esq., Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco, California

Dennis McCarthy, Esq., Van Cott, Bagley, Cornwall & McCarthy, 65 South Main, Salt Lake City, Utah

Leon M. Payne, Esq., Andreus, Keith, Campbell & Jones, 25th Floor Humble Building, Houston, Texas

A. H. Nebeker, Esq., Ray, Quinney & Nebeker, 300 Deseret Building, Salt Lake City, Utah

Arthur H. Dean, Esq., Sullivan & Cromwell, 48 Wall Street, New York, N. Y.

Re: United States of America

vs.

El Paso Natural Gas Company, et al.

C 143-57

Please Take Notice that Notice Of Appeal To The Supreme Court Of The United States was filed by Cascade Natural Gas Corporation on the 19th day of February, 1965, and entered in the Docket as of the 19th day of February, 1965.

Copy of the Notice of Appeal is enclosed.

Andrew John Brennan, Clerk, By: Ruth Bailey, Deputy Clerk.

cc:

William M. Bennett, Esq., Special Counsel for the People of the State of California, Room 5068 State Building, San Francisco, California

Richard Sabin, Esq., Assistant Attorney General, State of Oregon, Public Utilities Commission, 103 Public Service Building, Salem, Oregon 97310

Jones, Grey, Kehoe, Hooper & Olsen, Norton Building, Seattle, Washington 98104

[fol. 619]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil Action No. C 143-57

[Title omitted]

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed February 19, 1965

Larry L. Williams, Jack L. Lipson, Lawrence F. Noble, Attorneys, Department of Justice.

[File endorsement omitted]

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[fol. 621] I. El Paso Proposal

A. The New Company

1. The El Paso proposal contemplates the creation of a New Company, to which would be transferred the assets proposed to be divested and the stock of which would be spun off to El Paso shareholders. (DX-A; DX-F)

2. The New Company would receive from El Paso assets having a net book value of $243 million and a gross value of $275 million. (Boyd, Oct. 19 Tr. 20)

3. In return for the assets to be divested, New Company will assume $145 million of El Paso bond indebtedness, $35 million of sinking fund debentures, and will issue all of its capital stock, having a book value of $63 million, to El Paso. (Boyd, Oct. 19 Tr. 21; DX-A, Tab 11)

4. Since El Paso estimates that it would receive $107 million to $108 million on a rights offering of New Company stock, the value which it will receive through the assumption of its debt by New Company and from the sale of New Company stock will be $44 million to $45 million in excess of book value and $12 million to $13 million in excess of gross value of the assets to be transferred. (Boyd, Tr. 152)

5. No part of the proceeds of the sale of New Company stock will be given to the New Company. (Boyd, Tr. 153)

6. New Company will pay a rate of interest on the debt which it assumes which is ⅛% higher than the interest rate paid by El Paso on its debt. No part of this increased burden will be borne by El Paso. (Boyd, Oct. 19 Tr. 22-23; Tr. 168)

7. The amount of debt to be assumed by the New Company was arrived at by an estimate by El Paso of the amount which New Company could assume and still meet minimum standards established by the Federal Power Commission for new pipelines. (Boyd, Tr. 208)

[fol. 622] 8. The capitalization ratio of New Company under the El Paso proposal is 25.42% equity and 74.58% debt. (Boyd, Oct. 19 Tr. 62)

9. The debt ratio which New Company would have under the El Paso proposal runs considerably higher than that of other companies in the industry. (King, Tr. 758; GX 21)

10. A high debt ratio such as that proposed for the New Company would make it very difficult for it to do any major new financing for several years. (King, Tr. 765)

11. New Company would be in a much stronger position financially if its debt ratio were 65% rather than the 75% as planned, and it would be in a much better position to do additional financing of a pipeline to California. (King, Tr. 765-66)

12. In order to bring New Company's debt ratio down to 65%, an additional $24 million of equity capital would be required. (King, Tr. 766)

13. The New Company, if established as provided in the El Paso proposal, would have no cash except for "working funds" of $250. It is anticipated that the New Company will be immediately required to borrow an additional $5 million for working capital. (Boyd, Tr. 56-57)

14. If the New Company had an asset which could easily be liquidated to produce more than $5 million, it is obvious that additional borrowing to obtain operating cash would be unnecessary. (Tr. 58)

B. Ownership of New Company Stock

15. Under the El Paso proposal, each El Paso stockholder will receive an interest in New Company identical with his proportionate interest in El Paso. (Stipulation of Counsel, Tr. 75; DX-A)

16. Although it is proposed that New Company stock which would otherwise be distributed to officers and directors of El Paso, to holders of over ½% of the stock of

El Paso, and to employee funds controlled by El Paso [fol. 623] management would be placed in trust, that trust would affect a maximum of only 5.9% of the total stock. (DX-C; DX-I)

17. The stock of any officer or director of El Paso would be removed from the trust if at any time within ten years after the establishment of the trust the individual resigned his office with El Paso. Major stockholders of El Paso would be entitled to receive New Company shares whenever their El Paso holdings are reduced to less than ½%. (Boyd, Tr. 134-35)

18. During the duration of the trust, officers, directors, and large shareholders of El Paso would remain eligible to receive dividends on the New Company stock held in trust for them. (Kayser, Tr. 89)

19. 1625 stockholders, or 1.3% of the total number of El Paso stockholders, legally own about 45% of the total El Paso stock and would own a similar percentage of New Company stock under the El Paso proposal. (DX-H)

20. The distribution of El Paso stock is such as tends to perpetuate the original management, and the situation would be the same with respect to the New Company. (Kayser, Tr. 53-55)

C. Gas Reserves of New Company

21. On December 31, 1959, immediately prior to the merger of El Paso and Pacific Northwest, the latter had total reserves of 10,496.7 billion cubic feet of gas reserves. (GX 12)

22. On December 31, 1959, Pacific Northwest had 4,756.7 billion cubic feet of gas reserves in the San Juan Basin. (GX 12)

23. Under the El Paso proposal for divestiture, the New Company would receive total reserves of 7,592.9 billion cubic feet. (DX-A, Tab 7)

24. Under the El Paso proposal, the New Company would receive San Juan Basin reserves of 2,518.1 billion cubic feet. (DX-A, Tab 7)

[fol. 624] 25. El Paso has acquired substantial San Juan Basin gas reserves since its merger with Pacific Northwest. None of these would be transferred to the New Company under the El Paso proposal. (Hess, Tr. 329; GX 5, pp. 14-15; Tr. 583)

26. At the time of the merger, Pacific Northwest had at least 21.3% of the total combined San Juan reserves owned by it and El Paso. Under the El Paso proposal, New Company would receive only 17.01% of the total San Juan Basin reserves now owned by the merged company. (Derrick, Tr. 581; GX 16)

27. If New Company were to be established with the same percentage of the merged company's San Juan reserves as Pacific Northwest held at the time of the merger with El Paso, an additional 645.4 billion cubic feet of San Juan reserves would have to be transferred to it. (GX 14; GX 16)

28. Since the date of the merger, 832 billion cubic feet of gas has been consumed on the Northwest Division. Only 157 billion cubic feet of reserves acquired since that date will be transferred to the New Company under the El Paso proposal. (Boyd, Tr. 205-06, 212)

29. Any properly managed pipeline company should always be out replenishing reserves as they are used up. (Boyd, Tr. 190)

30. The San Juan gas reserves are the closest available source of supply to the California market. (Boyd, Tr. 253)

31. The San Juan Basin has the lowest wellhead price of any gas available to the New Company. (Boyd, Tr. 248-53)

32. At the time Pacific Northwest was certificated by the Federal Power Commission it was contemplated that

the San Juan Basin would be its principal source of supply. (Boyd, Oct. 19 Tr. 35; Tr. 108)

33. If New Company were to attempt to serve an increment of gas equal to the 250,000 m.c.f. per day which El Paso proposes for the California market, its deliverability life would fall from 14 years to 2 or 3 years. (Boyd, Tr. 290)

[fol. 625] 34. In the past, the Federal Power Commission has required pipelines to have a 12 year deliverability life. (Boyd, Tr. 190)

D. Stock Interest in Westcoast Transmission Company

35. At the time Pacific Northwest was acquired by El Paso, it had a stock interest in Westcoast Transmission Company, Ltd. of 1,127,750 shares. (Kayser, Tr. 59; Boyd, Tr. 169)

36. Under the El Paso proposal the Westcoast Transmission stock would not be returned to New Company. Rather, El Paso would sell it separately and retain for itself the proceeds of the sale. (Boyd, Tr. 169-70; DX-F, p. 4)

37. Present market value of Westcoast Transmission stock is approximately $16 per share. (Kayser, Tr. 59)

38. After tax income to El Paso from sale of the Westcoast Transmission stock would be approximately $14½ million. (Kayser, Tr. 60)

E. Tax Loss Carryover

39. Pacific Northwest had net taxable losses for the period 1955 through 1959 of $53,820,698.99 as a result of expenses which it incurred in setting up the company. (Rowe, Tr. 199; GX 6, Tab 6)

40. The entire amount of this tax loss was used by El Paso to reduce its tax burden during the period that the companies were merged. (Boyd, Tr. 254)

41. No compensation would be made to New Company under the El Paso proposal to compensate it for the value which El Paso received from the lower tax burden attributable to the deductions of Pacific Northwest's tax losses. (DX-A; DX-F)

F. Contracts Between El Paso and New Company

a. Sumas Contract

42. With regard to a pre-existing contract between El Paso and Pacific Northwest relating to the importation of gas at Sumas, Washington, it is contemplated that the same identical arrangement will be re-established under [fol. 626] the El Paso proposal. (Boyd, Oct. 19 Tr. 37; DX-A, Tab 3)

b. Contract with Colorado Interstate

43. A three party contract under which Pacific Northwest undertook to transport to the pipeline of Colorado Interstate a quantity of gas sold to Colorado Interstate by El Paso will be re-established as it was at the time of the merger. (Boyd, Oct. 19 Tr. 53-54; DX-A, Tab 6)

c. Gathering Agreement

44. Prior to the acquisition of Pacific Northwest by El Paso, the two companies agreed that El Paso would gather Pacific Northwest gas located in the Western portion of the San Juan Basin and Pacific Northwest would gather El Paso gas located in the Eastern portion. For any differential in the amount gathered, a price of 1.375 cents per m.c.f. would be paid, such price to be readjusted by further agreement if and when the circumstances warranted it. (Boyd, Oct. 19 Tr. 39)

45. In re-establishing the gathering agreement, El Paso proposes that the Court establish a 4.5 cent per m.c.f. gathering charge. This would be over three times as large

as the charge agreed upon by Pacific Northwest. (Boyd, Oct. 19 Tr. 41; DX-A, Tab 4)

46. The price which New Company would pay to El Paso for gathering gas during the period 1965-1970 if the charge is altered as proposed by El Paso would be as follows: 1965, $492,895; 1966, $592,463; 1967, $730,486; 1968, $853,552; 1969, $869,250; 1970, $910,088, or a total of $4,448,734. (GX 7)

47. The increase in gathering costs of New Company for the period 1965-1970 which would result from the proposed change in the rate is as follows: 1965, $349,122; 1966, $419,647; 1967, $528,816; 1968, $606,459; 1969, $615,385; 1970, $644,621, or a total increase during that period of $3,164,050. (Boyd, Tr. 230; GX 7)

[fol. 627] 48. The changes proposed in the gathering agreement as it existed prior to the acquisition have no relation to the independence of the New Company. To the extent that they relate to the viability of the New Company, they would make it less viable.

d. Kingsgate Contract

49. Pacific Northwest, before its acquisition by El Paso, had undertaken to negotiate for acquisition of Kingsgate gas and those negotiations had proceeded to the point where Westcoast Transmission and Pacific Northwest had actually gotten down to printing a proposed contract. After the stock acquisition, the agreement was executed by El Paso officers on behalf of Pacific Northwest on May 27, 1957. (Boyd, Tr. 109-10; Tr. 212)

50. The Kingsgate contract required Pacific Northwest to take a minimum of 135 million cubic feet of gas per day. (Boyd, Oct. 19 Tr. 42)

51. Because of the high load factor required, the Federal Power Commission feared that Pacific Northwest might not be able to absorb the entire quantity of gas involved in the Kingsgate contract. (Boyd, Tr. 113)

52. El Paso assured Canadian authorities and the Federal Power Commission that it would take responsibility for any quantities of gas which Pacific Northwest was required to take under the Kingsgate contract which could not be absorbed by its system. (Boyd, Tr. 113)

53. Pursuant to the assurances given by El Paso to the Federal Power Commission, a proposed contract calling for El Paso to take any quantities of Kingsgate gas which could not be absorbed by Pacific Northwest was made a part of the application for permission to import the gas. This contract was never executed because the merger of El Paso and Pacific Northwest automatically placed that responsibility on El Paso. (Boyd, Tr. 114; GX 8)

[fol. 628] 54. Under the El Paso proposal for divestiture, El Paso could not be required to take more than certain stated quantities of Kingsgate gas, regardless of whether the remainder could be absorbed by the New Company system. These quantities are in decreasing amounts over a five year period. For any amounts which it is required to take under this provision, El Paso would pay only the Canadian border price. At the end of five years, El Paso would have no obligation to take any Kingsgate gas. (Boyd, Oct. 19 Tr. 43; DX-A, Tab 5)

55. The proposed Kingsgate arrangement would permit New Company to take from El Paso during its peak period a quantity of gas not to exceed that which El Paso takes from New Company under provisions of the proposed arrangement. For this gas, New Company would pay a price of 18.5 cents per m.c.f., a price computed by adding the 4.5 cent gathering charge proposed by El Paso to the 14 cent wellhead price of San Juan gas. (Boyd, Oct. 19 Tr. 43; DX-A, Tab 5)

56. The changes proposed in the Kingsgate arrangement which existed prior to the merger have no relation to the independence of the New Company. To the extent that they relate to the viability of the Company, they would make it less viable.

II. Alternatives to El Paso Proposal

A. Sale to Third Party

a. In General

57. There are several groups independent of El Paso which are willing and able to purchase the New Company which is to be created by the divestiture and operate it as an independent pipeline company. These persons are responsible both financially and with regard to their ability to manage the new pipeline. (Stipulations of Counsel, Tr. 742-43; 749-50)

[fol. 629] b. Colorado Interstate Gas Company

58. Colorado Interstate Gas Company is a natural gas transmission company, serving generally the territory on the eastern slope of the Rocky Mountains, extending from the Panhandle of Texas, Oklahoma, and Kansas in a northwesterly direction and in a southwesterly direction from western Wyoming to Denver, Colorado. Its net utility plant is approximately $125 million. (King, Tr. 740-41)

59. Colorado Interstate is interested in purchasing the assets to be divested. (King, Tr. 742)

60. For several months Colorado Interstate has attempted to discuss with El Paso a purchase of the properties to be divested, but has been rebuffed in its attempts. (King, Tr. 741; Stipulation of Counsel, 745)

61. Colorado Interstate would be interested in using the facilities to be divested as the basis for a project to enter and serve the California market. It is improbable that Colorado Interstate would, by itself and without those facilities, be in a position to enter the California market. (Offers of proof, Tr. 751-52)

62. Colorado Interstate has the financial backing of Dillon, Read & Company, a New York investment banking firm. (King, Tr. 750)

c. Pacific Western Pipeline Corporation

63. Pacific Western Pipeline Corporation is a corporation formed by a group of Western businessmen with the objective of negotiating with El Paso for acquisition of the properties to be divested. (Conkling, Tr. 787)

64. Pacific Western is not affiliated with any gas distribution company, gas pipeline company, or gas producer. (Conkling, Tr. 790)

65. Pacific Western has competent management to operate the facilities to be divested and the financial ability to acquire them. (Conkling, Tr. 789-90)

[fol. 630] 66. Pacific Western has the financial backing of Blythe and Company, one of the nation's largest investment firms, and of the Bank of America. (Conkling, Tr. 790-91)

67. Although Pacific Western has communicated with El Paso and requested information on which it could base a firm offer, no such information has been made available. (Conkling, Tr. 791-92)

68. Pacific Western has submitted to El Paso a proposal which would have the same tax consequences as the spin-off proposal of El Paso. (Conkling, Tr. 792)

69. Under any plan proposed by Pacific Western for acquiring the facilities to be divested, the ownership of the New Company would be completely separate from the ownership of El Paso. (Conkling, Tr. 796)

70. Pacific Western would intend to use the facilities to be divested as a base for expanding into the California market. (Conkling, Tr. 790; Offer of proof, Tr. 796)

d. Paradox Production Corporation

71. Paradox Production Corporation is a publicly owned Nevada corporation organized in 1957 by former employees

of Pacific Northwest for the purpose of exploring for and developing oil and gas properties. (Carson, Tr. 775-76)

72. Paradox is interested in acquiring the assets to be divested. (Carson, Tr. 777)

73. Paradox communicated its desire to purchase the assets to be divested to El Paso by letter of May 22, 1964. The only reply was a letter noting the interest of Paradox. (Carson, Tr. 777)

74. Following an unsuccessful attempt by Paradox to meet with officers of El Paso on June 2, 1964, Paradox, on June 18, 1964, again wrote to El Paso, reiterating its interest in acquiring the facilities to be divested. No reply has ever been received to that letter. (Carson, Tr. 777)

[fol. 631] 75. The purpose of Paradox in seeking to purchase the assets to be divested is to operate the pipeline system as a completely independent arm of the natural gas business. (Carson, Tr. 779)

76. Paradox has the financial backing of the Morgan Guaranty Trust Company, Bear Stearns and Company, and the Massachusetts Protective Association for its proposal. (Carson, Tr. 779)

77. Paradox is completely independent of El Paso and would remain so after the divestiture. (Carson, Tr. 783)

78. Paradox, if it purchased the facilities, would seek to serve all the present markets of the Northwest Division and in addition, if it could get the gas reserves, would attempt to enter the California market. (Carson, Tr. 785)

B. Variation of Spin-off Proposal

79. There is no evidence that it would be at all difficult, much less impossible, to require that El Paso stockholders elect either to dispose of their El Paso stock, in which case they would be entitled to receive shares of New Company, or in the alternative to elect to have their New Company stock sold for their account. This method of distributing

the stock of New Company would result in completely independent ownership, as well as management.

C. Other Methods of Distributing Stock of New Company

80. There is no evidence that it would be at all difficult, much less impossible, simply to have New Company issue its own stock publicly, with restrictions on purchases by El Paso shareholders, and pay El Paso for the assets to be transferred out of the proceeds of that sale.

III. Conclusions of Law

1. In view of the fact that there are available alternatives which would provide for completely separate and independent ownership of the New Company, the El Paso proposal, under which the New Company would be owned [fol. 632] by the stockholders of El Paso, does not provide for an acceptable form of divestiture.

2. The El Paso proposal is inadequate in that it would permit El Paso to retain benefits which it acquired through its violation of Section 7 of the Clayton Act and would fail to re-establish the New Company in the same position which Pacific Northwest would occupy had it not been for the acquisition and merger.

3. Contracts and arrangements entered into between Pacific Northwest and El Paso prior to the date of the merger should be reinstituted. The question of whether modifications should be made in those contracts and arrangements and, if so, the form which such modifications should take, are issues which should be deferred to the Federal Power Commission.

Respectfully submitted,

Larry L. Williams, Jack L. Lipson, Lawrence F. Noble, Attorneys, Department of Justice,

Dated: February, 1965.

[fol. 633]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil Action No. C 143-57

[Title omitted]

PLAINTIFF'S BRIEF AFTER DIVESTITURE HEARINGS—Filed February 19, 1965

Larry L. Williams, Jack L. Lipson, Lawrence F. Noble, Attorneys, Department of Justice.

[fol. 634]

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[fol. 635] Introduction

This brief is submitted in accordance with the Court's direction that each of the parties prepare a memorandum summarizing the essential facts in these divestiture hearings, with appropriate citations to the record.

In general, the object sought by the Government has remained constant throughout these proceedings. We seek to reconstitute Pacific Northwest Pipeline Corporation—or New Company—as a viable pipeline, able to serve its markets and able to expand to serve other markets. We seek to re-establish this company in such a way as to enable it to offer competition to El Paso for the California market and elsewhere. We agree with counsel for El Paso's statement that "the real purpose of the proceeding is to accomplish what, in substance, would have happened if, before the acquisition of the stock of Pacific Northwest, the Attorney General had intervened with a suit and successfully enjoined the acquisition." (Tr. 66) In order to accomplish this result we believe that the New Company should be created to stand free from any connection with El Paso and should receive an equitable allocation of the assets acquired by the combined company during the years of the merger.

[fol. 636] I. Spin-Off

Defendant's Chairman concedes that the El Paso's spin-off plan will give each of the present El Paso stockholders a stock interest in New Company that would represent an identical proportionate interest in the equity of New Company as each El Paso stockholder now holds in El Paso itself. (Tr. 74, 75)

It follows that each El Paso shareholder, whether large or small, would obtain these New Company shares along with all the usual property rights, dividend rights and voting rights except for the minor restrictions on a few shareholders to be discussed later in connection with El Paso's proposed trust arrangement. Over 99.8% of El Paso's shareholders—which include those shareholders with

individual holdings in El Paso stock valued up to $2,637,916 at current market prices ($23/share)—would obtain an identically proportionate number of shares in New Company and these same El Paso stockholders would *at the same time* become the shareholders of New Company with no restrictions on their power to dispose or vote any of these New Company shares. This same 99.8% of the El Paso and New Company shareholders would represent over 95% of the common stock of each company. Just as the Supreme Court found that the spin-off proposed in *Union Pacific* was "a proposition to perpetuate the domination and control of the Union Pacific Company over the Southern Pacific Company" (475) so here also, El Paso's proposed spin-off is no more than a proposition to perpetuate the domination and control by El Paso Natural Gas Company over the Pacific Northwest Pipeline Corporation. The preservation of such a high degree of common ownership between the two companies is not compatible with an effective decree of divestiture whose object is *to* re-establish competition. In the *Union Pacific* case, 226 U.S. 470, the Supreme Court rejected an even less offensive spin-off where the common ownership would have been only 46%. [fol. 637] More recently, in the *duPont* case, 366 U.S. 316, the Supreme Court rejected a spin-off where the resultant common ownership would have been represented by only 16% of the acquired corporation's outstanding shares.

Under the El Paso plan New Company would be about one quarter the size of El Paso after divestiture. It would be contrary to all human experience to expect that the management of New Company would not constantly be aware of the fact that 99.8% of all shareholders of New Company would have an investment in El Paso four times as great as their investment in New Company. This knowledge that direct competition with El Paso would probably endanger its own shareholders' interests, would tend to dampen any desire of New Company's management to compete vigorously for El Paso's markets. That plan would

thereby defeat the very object of this divestiture which is to re-establish New Company as a vigorous competitor.

Similarly, common experience of humanity indicates that a shareholder who owns the same share of the equity of each corporation but whose investment value in El Paso is four times that of New Company, would be interested in voting his New Company shares in such a manner as not to jeopardize his greater investment in El Paso.

The Proposed Trust

El Paso proposes to impose certain minor restrictions by way of a trust on the voting rights connected with the New Company shares to which El Paso's own officers and directors would otherwise be entitled. According to Defendant's Exhibit I, these minor restrictions would affect only 26 shareholders in that category in addition to members of their immediate families. El Paso also proposes to impose some similar restrictions on persons who beneficially hold one-half of one percent or more of El Paso's common stock.

There are 22,938,369 shares of El Paso stock presently outstanding of which one-half of one percent equals 114,692 shares. (DX-H) No restrictions under this proposed trust or otherwise would be imposed on persons who own less [fol. 638] than that number of El Paso shares unless they were among the 26 officers and directors of El Paso. This is affirmed by Mr. Boyd's testimony at page 152 of the transcript—

> Q. And unless he were an officer or director, there would be no restrictions at all on the individual if he owned one single share less than that represented by one-half of one percent of the total outstanding El Paso shares.
>
> A. That's right. That's what we proposed.

The practical effect of El Paso's proposed trust is that only four persons (plus their immediate families) not already restricted because they are El Paso officers or direc-

tors would be precluded from participating in all the legal and equitable rights as stockholders in New Company. The total number of El Paso shareholders who would be restricted from full participation in the legal and equitable rights of ownership in a proportionate number of New Company's shares equals *only* 30 persons plus their immediate families; 26 as officers or directors, plus 4 others as large stockholders owning over one-half of one percent of El Paso's stock.

The 30 persons subject to El Paso's proposed trust represent a small fraction of the total number of 130,000 El Paso stockholders. (DX-R) Each of the other 129,970 El Paso shareholders, constituting over 99.9% of the total number of El Paso shareholders will be outside the trust and will have a completely unrestricted as well as identically proportionate interest in the shares of New Company as they now have in the shares of El Paso.

Defendant's Exhibits C and I establish that (with respect to the number of shares of stock subject to this proposed trust) only 1,362,642 shares or less than 6% of the total number of 22,938,369 outstanding shares of El Paso stock would carry with them any restrictions whatsoever to corresponding New Company shares under the proposed trust. Therefore, only an equivalent 6% of New Company shares [fol. 639] would be subject to any "trust" restrictions. The remaining 94% of the New Company shares would be legally and equitably owned, voted and controlled by El Paso shareholders.

According to a description of the trust given by El Paso's counsel and by Mr. Boyd in their stipulation and testimony, the trustee would hold the New Company shares attributable to El Paso's management for up to ten years unless the El Paso officer or director sooner retired. As shown by Defendant's Exhibit I a number of El Paso's directors own substantial quantities of El Paso stock.[1] Under the trust

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[1] Mr. Lawrence Arnold, Director owns 2,000 shares
Mr. Howard Boyd, Director owns 4,000 shares

(footnote continued on next page)

plan these persons would be entitled to the corresponding proportion of shares in New Company stock except that these shares would be placed in the trust pending retirement. As Mr. Kayser testified, a number of these persons have had many years service with the El Paso and retirement within ten years is certainly a probability in several cases.[1] At that time these persons would be able to take up their shares in New Company and hold and vote them in an unrestricted fashion while at the same time holding and voting their El Paso shares. After 20 or more years of service on the El Paso Board of Directors these persons can reasonably be expected to retain a certain degree of sympathy toward El Paso and may tend to vote their New Company shares accordingly.

According to the terms of the proposed trust only two persons among the El Paso directors, Messrs. Glassell and Kayser, would not be allowed to remove their New Company shares from the trust if they retired within ten years, [fol. 640] because they each own in excess of one half of one percent of El Paso's shares (and presumably of New Company's under the plan). All other El Paso directors and officers will clearly be able to become shareholders in New Company if they retire within ten years. However, even Mr. Kayser, El Paso's Chairman and founder, may become a principal shareholder in New Company. According to Government Exhibit 1, which is the El Paso stockholders' list of April 24, 1964, Mr. Kayser was listed as hold-

Mr. Alfred Glassell, Jr., Director	owns 229,429 shares
Mr. Paul Kayser, Chairman	owns 115,116 shares
Mr. Leon Payne, Director	owns 34,608 shares
Mr. C. L. Perkins, Director	owns 10,000 shares
Mr. Frans Schneider, Director	owns 26,000 shares
Mr. H. F. Steen, Director	owns 2,454 shares
Mr. F. T. Wagner, Director	owns 4,427 shares
Mr. C. R. Williams, Director	owns 90,818 shares

[1] We are informed, outside the record, that Mr. Kayser himself has retired as Chairman of the Board of El Paso, though we understand he still retains some connection with the Company.

ing 120,116 shares. However, according to the Defendants' Exhibit L presented to this Court December 2, 1964, Mr. Kayser has decreased his holdings by gift, sale, or otherwise to the point where he holds only 115,116 shares. After retirement Mr. Kayser has but to dispose of an additional 425 shares and he will be eligible to personally own and vote shares in New Company proportionate to his holding of 114,691 El Paso shares.

Even during the ten-year period while these El Paso management shares remain in this trust, the management of New Company cannot help but be aware that El Paso's directors will be voting substantial blocks of New Company shares as soon as they retire. Even while the trust is in effect the managers and directors of El Paso would be entitled to dividends from their New Company stock (Tr. 89) and New Company management would always be aware of these facts.

This same inhibiting effect of this trust on the independent discretion of New Company management is underscored by Howard Boyd's testimony. According to Mr. Boyd's description of the trust, the trustee would have no power to sell except at the direction of the beneficiaries. Thus, even while he continued as an El Paso officer and director, an individual beneficiary could exercise some influence on New Company policy by directing trading in his New Company shares (Tr. 84, 88, 89).

This contemplated trust also portends serious administrative problems. It will not terminate at the end of any [fol. 641] pre-determined period and so far as presently appears, it may never terminate. It could last indefinitely for so long as a shareholder continues to own as much as ½ of 1% of El Paso shares, his New Company shares are to be trusteed. Since no shareholder is obliged to sell his El Paso shares, and since tax and personal considerations may make it advantageous to continue to hold these shares, it is clear that the trust can run indefinitely. As Mr. Boyd has testified on page 135, the large stockholder's shares would be held by the trustee "so long as their ineligibility existed."

This same possibility of a perpetual (or at least indefinite) trusteeship would exist with respect to two large funds, the El Paso Savings Fund, and an El Paso Retirement Fund, which together hold 254,796 shares of El Paso stock (DX-L). By adding the 25,000 shares in the Kayser Foundation, the total would equal 279,000 (GX 1). Under the El Paso plan these three funds would be entitled to a proportionate interest in New Company stock. None of the three funds has a terminal date and since they may retain their El Paso shares without any limit as to time, the corresponding trust of New Company shares could continue for the same indeterminate period. Similarly, individual accounts like the Fish Estate or Kenneth Adams could retain a ½ of 1% block of El Paso for many years and pass it on to future generations in the same large block, thereby requiring continued indefinite trusteeship of the competing New Company shares. (GX 1)

By allowing persons identified with El Paso to participate in stock ownership in New Company the El Paso plan would defeat the purpose of divestiture and the associated trust device would impose a real regulatory burden on both this Court and on the Department of Justice to oversee the trust for an unknown and undeterminable period of time. Even Mr. Boyd conceded on the witness stand that the trust arrangement could easily last fifty years (Tr. 145). Such a result is incompatible with the Supreme Court's mandate which ordered divestiture "without delay."

[fol. 642] Even if the trust were effective to block the trusteed shares from participation in New Company's activities, there would still be so many shares—over 94% outside the trust—and so many shareholders—about 99.8% —outside the trust, that the trust itself would have no effect whatever in insuring competition between the two companies. At best the proscriptive effect of the trust would be negligible.

In summary, the trust device proposed by El Paso does nothing to cure the competitive defects of the proposed

spin-off. Even assuming that the trust arrangement proposed by El Paso would be effective to insure competition with respect to the shares trusteed—which proposition the Government disputes—still that trust only affects an insignificant number of shareholders and too small a percent of shares.

Distribution of El Paso's Shares

El Paso's distribution of shares among many stockholders does not mitigate the anticompetitive threat that would follow from common ownership of the stock of El Paso and New Company. While El Paso does indeed have a large number of shareholders, analysis of El Paso's Exhibit H reveals that a fairly small percentage of all shareholders own a very large proportion of the corporation's stock. That exhibit establishes that of El Paso's 117,500 shareholders of record, 85,695 or 73% each own 100 shares or less, and as a group they own only 18% of the 22,938,396 shares outstanding. The converse is equally true—that only about 27% of all El Paso shareholders of record (31,905 in number) own 82% of the outstanding stock.

This showing that a minority of shareholders controls an overwhelming majority of the shares would not change if we also considered Defendant's Exhibit R which shows that there are 12,000 beneficial owners of the El Paso shares held in the names of brokerage houses—since we know [fol. 643] that ownership of this block is also highly concentrated.[3]

Paul Kayser testified that "generally speaking your wide distribution would be found in 200 [shares] and less" (Tr.

[3] Only 69 accounts of these 12,000 held 5,000 shares or more. (DX-K) El Paso failed to solicit similar information from the brokerage houses it contacted in formulating DX-R as it did when it prepared DX-H, therefore a precise breakdown of these 12,000 beneficial holders cannot be derived from the record. However, in view of the information available we can assume that the relative relationship would continue to be the same.

50). Defendant's Exhibit H establishes that 88% of persons who are El Paso shareholders of record own 200 shares or less but that their holdings constitute only 32% of the outstanding El Paso shares. Here again, the converse is equally true that 12% of all El Paso shareholders of record own about 68% of the outstanding shares.

Shareholders of El Paso with large dollar values invested in the company probably represent accounts who would be in the same relative position to influence the management decisions of New Company. There are 21 beneficial owners of El Paso stock, each holding shares valued at one million dollars or more at the current market. Together they account for *9.54%* of total outstanding shares. If we include the brokerage houses that own one million dollars or more in El Paso shares, we have a total of 38 accounts representing *18.43%* of all outstanding shares. Using a lower valuation point of one-half million dollars in El Paso shares, there are 46 beneficial shareholders owning 2,916,823 shares which represent *12.72%* of all outstanding shares in El Paso. Adding brokerage house accounts, the total number of accounts over this half million dollar figure would increase to 82 and the number of shares held to 5,795,592 or *25.27%* of all outstanding El Paso shares. (GX 1)

Thus, control of substantial blocks will be concentrated in the same relatively few hands as is the case with El Paso. In the context of El Paso's otherwise dispersed distribution of stock even the smallest of these blocks can exercise a decisive influence over management. Since each of these persons and all other stockholders similarly situated will have an interest in New Company that is *identical* to their [fol. 644] proportionate interest in El Paso each of them will be in a position to exercise a similar degree of influence on New Company.

Even a truly wide distribution of shareholder interest would constitute no basis in law for approving the type of spin-off offered by El Paso. In the *Union Pacific* case, 226

U.S. 470, the Supreme Court ruled that a distribution of 46% of Southern Pacific's stock among 22,000 Union Pacific shareholders would *not* in fact be sufficient to conclude the combination. In the *duPont* case, distribution of 23% of General Motors shares to over 230,000 individual owners of duPont stock was here also found to be an ineffective and inappropriate device to accomplish a divestiture in a case involving a §7 Clayton Act violation. The *duPont* case is particularly noteworthy because there General Motors already had over 700,000 stockholders of record owning 77% of the General Motors shares outstanding so that the spin-off that the Supreme Court refused to accept in that case would have occurred in a setting where the distribution of ownership was far wider than El Paso's. (See 177 F. Supp. 13).

For the foregoing reasons the spin-off proposed by El Paso should be rejected as constituting an inappropriate form of divestiture in this case.

[fol. 645]

II. Available Alternative Divestiture Plans Proposed by the Government

The record establishes that there are appropriate ways by which this Court can divest the ownership of New Company from El Paso that would insure the complete separation of ownership and management between New Company and El Paso and which would thereby remove the barriers to competition inherent in the El Paso spin-off proposal. We refer here to either a sale to competent third party purchasers or a "Reading" type spin-off such as sanctioned by the Supreme Court in *Continental Insurance et al.* v. *U.S.*, 259 U.S. 156.

The Government has produced representatives of three separate prospective buyers of New Company, each of whom testified that they were willing to purchase New Company and operate it as a going pipeline in competition with El Paso. (Tr. 738-96) None of these prospective buyers

is associated with El Paso. Two of the three prospective buyers are completely independent of any other pipeline and each of the three would constitute a new entrant in the natural gas markets west of the Rockies, particularly California. (Tr. 751-52, 783, 785, 790)

El Paso has declined to negotiate with any of these prospective purchasers (Tr. 745, 777, 788, 792) and has even declined to supply additional information when it was requested.[4] (Tr. 746)

Yet there is no question but that these persons represent able and willing buyers each of whom is competent to operate the pipeline to be divested. (Tr. 776) El Paso has stipulated on the record that these persons are financially responsible and are able to manage the pipeline. (Tr. 742, [fol. 646] 749-50, 758, 777-78, 779-87, 790-91, 793-96; GX-23) Each of these prospective buyers has testified or offered to testify about his willingness to use this pipeline as a base from which to expand to serve the California market in competition with El Paso. (Tr. 751, 790, 796) Thus, sale to a third party is both a desirable and feasible alternative to the El Paso plan.

Finally, this Court would face no difficulty in executing a "Reading" type divestiture as described in *Continental* v. *U.S. (supra)* for although that procedure would require marketing of New Company shares, El Paso agrees that the shares are marketable. (Tr. 743)
[fol. 647]

III. Gas Reserves

New Company requires more gas reserves than El Paso is willing to allocate to it under El Paso's own divestiture plan. Only if New Company receives at least 600 billion additional cubic feet of natural gas can it be returned to

[4] El Paso's failure to even negotiate with these prospective buyers is difficult to understand since at least one of the three has proposed a plan that would result in a tax saving to El Paso of $24.5 million. (Tr. 792)

the competitive position occupied by Pacific Northwest Pipeline Corporation prior to the merger, for only then could New Company be put in a position from which it could begin to compete to serve the California market.

El Paso proposes to transfer to New Company 7,592.9 billion cubic feet of natural gas (DX-A, Tab #7). However, at the date of the merger Pacific Northwest had reserves of 10,496.7 billion cubic feet (GX 12). Since the merger date the gas reserves attributed to Pacific Northwest (and the Northwest Division of El Paso, which succeeded to Pacific Northwest's property) have constantly decreased, and insufficient new gas reserves have been added to the system to compensate for the decline. This remains true even if we begin our comparison with the year-end figures for 1960 when El Paso instituted a change in the method of measuring reserves. The comparable figures would then be 9,517.3 billion cubic feet for the successor to Pacific Northwest in 1960 compared with 7,592.9 billion cubic feet proposed for New Company at this time. By either comparison Pacific Northwest (and its successor) has suffered a substantial net loss of gas reserves while under El Paso's stewardship. These facts are best illustrated by the following figures drawn from Government Exhibits 15 and 17:

Gas Reserves of Pacific Northwest and Successor

Date	
December 31, 1959	10,862.3 billion cu. ft.
December 31, 1960	9,517.3 " " "
December 31, 1961	9,325.4 " " "
December 31, 1962	8,874.4 " " "
December 31, 1963 (Proposed to be transferred to New Company)	7,592.9 " " "

[fol. 648] It is clear that without the additional gas requested by the Government New Company will not be able to compete with El Paso for the California market. Under the El Paso divestiture plan, New Company would have a reserve life index of 27.4 years (DX-A, Tab #7), which will be comparable to El Paso's reserve life index of 26.8 years. (Tr. 28, 29, Oct. 19 proceeding; Tr. 186) However, should New Company seek to serve the California market with a relatively small increment of gas—250 million cubic feet per day, which represents the smallest quantity that El Paso is itself currently seeking to bring to the California market—then New Company's reserve life index would drop substantially, to only 20.6 years. Howard Boyd has also testified that if we measure the effects of the proposed 250 million cubic feet increment to California according to the other common industry standard of "deliverability life," then New Company's deliverability life would fall sharply from fourteen years to only two or three years, which is far below any accepted level permitted by the Federal Power Commission or even suggested by El Paso. (Tr. 290).

The San Juan Basin is the logical place from which this additional gas should be obtained. Howard Boyd has testified that when Pacific Northwest was originally certificated by the Federal Power Commission it was contemplated that the San Juan Basin would constitute its exclusive source of gas. (Tr. 35, Oct. 19 proceeding.) Government Exhibit 12 illustrates that even by the date of the merger, after other gas supply areas had been connected to Pacific Northwest's system, the San Juan Basin still remained Pacific Northwest's largest single gas supply area, and represented about 45% of the company's total reserves. The San Juan Basin is also the closest out-of-state geographical source of supply for the California market, and it is the principal area [fol. 649] where both Pacific Northwest and El Paso competed for reserves prior to the illegal acquisition. Howard Boyd has testified that the well-head price of gas in the San Juan Basin of 14¢ per mcf represents the cheapest

well-head price of gas available along the entire Pacific Northwest system. (Tr. 253) Boyd also testified that the cost of transporting natural gas to a market is even more important than the well-head price. (*Ibid.*) Since the San Juan Basin gas is both cheap and closest to the constantly expanding California market, its significance as a reserve for service to California by the New Company is established.

Following El Paso's illegal acquisition of Pacific Northwest, the latter's activities in developing gas reserves in the San Juan Basin all but ceased. (GX 3) However, after the merger, huge additional quantities of gas were discovered in the San Juan Basin by the merged company and in its Annual Report to shareholders for 1962 El Paso stressed the importance of these post-merger gas discoveries for serving the California market (GX 5, pp. 14-15). Howard Boyd has testified that New Company will not participate in any share of these newly-discovered reserves. (Tr. 185) He has testified categorically that El Paso's divestiture plan contains no provision to allocate *any* portion of this newly discovered gas to New Company despite the fact that it was discovered by the combined company consisting of El Paso and Pacific Northwest. (*Ibid.*)

In the San Juan Basin where the two pipelines competed for gas reserves prior to the illegal acquisition, Pacific Northwest's (and its successor's) gas reserves have decreased substantially since the merger, while El Paso's gas reserves have increased, both in absolute quantity of gas in the Basin and in the relative percentage compared with Pacific Northwest. This comparison is shown by the following chart:

[fol. 650]

Gas Reserves in the San Juan Basin
(Billions of cubic feet)

Date	Pacific Northwest & Successor	El Paso	Combined
December 31, 1959	Quantity: 4,756.7 Percent: 27.53	Quantity: 12,521.9 Percent: 72.47	17,778.5
December 31, 1960*	Quantity: 3,311.6 Percent: 24.81	Quantity: 10,034.1 Percent: 75.19	13,779.9
December 31, 1961	Quantity: 3,228.3 Percent: 24.70	Quantity: 9,839.5 Percent: 75.30	13,477.8
December 31, 1962	Quantity: 3,025.0 Percent: 24.80	Quantity: 9,685.4 Percent: 76.20	13,093.2
December 31, 1963	Quantity: 2,518.1 Percent: 17.01	Quantity: 12,285.0 Percent: 82.99	14,899.1

The foregoing chart is derived exclusively from the Government's exhibits but when El Paso's own petroleum engineer A. M. Derrick, who is also Manager of El Paso's Reservoir Engineering Department, was examined by El Paso's counsel on *direct*, he testified that as of December 31, 1959 Pacific Northwest held 21.3% of the combined reserves in the San Juan Basin, compared with El Paso's 78.7%. He conceded that under El Paso's divestiture proposal New Company would now receive only 17.01%, compared with El Paso's 82.99% of the combined San Juan Basin reserves. (Tr. 581) Therefore, assuming the accuracy of its own figures even El Paso would admit that under its divestiture plan New Company's share of the combined San Juan Basin reserves is 4.3% less than Pacific Northwest's share at the time of the merger. Based on El Paso's own current estimate of gas reserves in the Basin, this differential of 4.3% represents over 640 billion cubic feet. That is approximately the same quantity of gas that the Government seeks to add to New Company's reserves. Thus, the testimony of El Paso's own expert underscores the accuracy of the Government's position.

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* Revised method of measurement begins with 1960 figures (GX 14, GX 15, GX 16).

[fol. 651] El Paso has not compensated New Company with any other gas reserves to remedy its failure to allocate an equitable share of the post-merger gas discovered in the San Juan Basin or to make up for the depletion of Pacific Northwest's total supply. The principal quantity of gas that El Paso has contributed to New Company from Canadian sources, i.e., Kingsgate Gas, was already in the process of being acquired by the independent Pacific Northwest management prior to El Paso's acquisition of Pacific Northwest on January 1, 1957. In arranging for the acquisition of this Kingsgate gas, while Pacific Northwest was an independent, Pacific Northwest had advanced to the point where a contract was drafted between it and its Canadian source of supply, West Coast Transmission Company, Ltd., (Tr. 109). Howard Boyd has admitted that all El Paso did after it acquired Pacific Northwest was to pursue these same negotiations that the independent company had initiated and to make $3 million in advance payments—something that could hardly have been regarded as beyond the capability of a quarter billion dollar pipeline like Pacific Northwest. (Tr. 27) Boyd also testified:

> The managers of PNW, even before we took it over, recognized the value of Kingsgate gas and undertook to negotiate for it. (Tr. 122)

Even El Paso, in its brief* (p. 31) stresses the fact that Pacific Northwest was in an admirable position to acquire Canadian gas reserves. Proof that the Kingsgate gas is properly considered Pacific Northwest's reserve is the fact that after these reserves were acquired they were listed in the official reports filed with the Federal Power Commission as belonging to Pacific Northwest. (GX 17)

Therefore, when Howard Boyd testified that El Paso proposed to launch New Company with "probably a trillion

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* "Memorandum In Support of El Paso's Plan for Divestiture," filed in January 1965.

[fol. 652] cubic feet more of gas than they had at the time we [El Paso] took it over," it should be kept in mind that the trillion cubic feet represented by Kingsgate gas is the same gas that Pacific Northwest was already in the process of acquiring for itself.

Even if El Paso were to be given exclusive credit for acquiring the Kingsgate gas, which is doubtful in view of the foregoing facts, the gas was in any event acquired before the asset merger and was listed as Pacific Northwest's reserve. (GX-47) Since the date of that merger, which now covers a period of more than five years, El Paso has failed to acquire enough additional gas reserves for Pacific Northwest (or its successor) to balance the amount consumed during this same period. Total additions to Pacific Northwest's reserves since the merger equal only 157 billion cubic feet, while total consumption equals 832 billion cubic feet, resulting in a *net loss* of 675 billion cubic feet. (Tr. 205, 206) Clearly these facts demonstrating decreasing gas reserves do not square with good management practice in the industry, for, Howard Boyd testified that it was the proper duty of a pipeline management to always replenish reserves as they are used up. (Tr. 190) Hence, the Government's request for an additional 600 billion cubic feet to New Company's reserve seeks to accomplish this very result which is admittedly required by good pipeline management, i.e., to replenish the reserves that have been consumed since the merger.

The same result follows if we use January 1, 1957 as a starting date for our computation. Since that date the supplies of gas already acquired by Pacific Northwest could be broken down as follows:

[fol. 653]

Kingsgate gas	1,020	billion cubic feet
Big Piney gas	1,545	" " "
Rocky Mountain gas	141	" " "
San Juan gas	285	" " "
Total	2,991	billion cubic feet

In determining which of these supplies El Paso has contributed to Pacific Northwest which the latter could not have acquired on its own behalf, we can subtract out the Kingsgate gas as representing a supply that Pacific Northwest was well on the way to acquiring prior to El Paso's illegal acquisition. Similarly, the additional quantities of Big Piney gas acquired by El Paso on behalf of Pacific Northwest represented additional quantities of gas that were *added to original agreements made by an independent Pacific Northwest prior to El Paso's acquisition.* (GX 18) In that sense, Pacific Northwest already had a "string" on these reserves. It therefore appears that the gas reserve that El Paso alone was responsible for contributing to Pacific Northwest during the past eight years is only 426 billion cubic feet, all of which are derived from geographic areas in which Pacific Northwest was actively developing gas reserves.

Therefore, whether we measure from the stock acquisition date of January 1, 1957 or from the asset merger date of December 31, 1959 El Paso has not compensated Pacific Northwest or New Company for its failure to allocate an equitable share of gas reserves since discovered in the San Juan Basin by the combined companies.[5]

[fol. 654]

IV. Contracts Between El Paso and New Company

The El Paso proposal contemplates that New Company and El Paso will enter into four contracts as part of the divestiture. (DX-A Tabs 3, 4, 5, 6) Since these proposed contracts in the divestiture plan relate to contracts and proposed contracts that existed *before* the merger it is only proper that the New Company should succeed to the

[5] El Paso has not proposed to transfer all its Rocky Mountain gas reserves to New Company. Under its divestiture plan, El Paso proposes to retain over 220,472 net acres of Rocky Mountain gas reserves valued at $8,847,281.

contractual obligations and benefits of its predecessor, and the Government does *not* object to the re-establishment of such contractual relations as they existed at the time of the merger. However, we *do* object, where the contracts proposed by El Paso and which will hereafter bind New Company differ substantially from the arrangements that existed prior to the merger. In the case of two of these contracts, the changes from the pre-merger arrangements have been unilaterally effected by El Paso and are in each case detrimental to New Company and advantageous to El Paso.

These two contracts are the "Kingsgate contract" and the "Gathering Agreement" (DX-A Tabs 4, 5). In decreeing effective antitrust relief it is neither necessary nor appropriate for this Court to re-write these arrangements. The original arrangements should be reinstituted subject to any changes required by the Federal Power Commission acting in the exercise of its jurisdiction under the Natural Gas Act.

The Kingsgate Contract

With respect to the Kingsgate contract (Tab 5 of DX-A), the modified version of the agreement gives New Company an obligation to take the entire amount of a large quantity of gas to be delivered from Canada under an agreement with Westcoast Transmission Company. The problem arises only because this revised agreement sponsored by El Paso requires that New Company take the gas at a very high load factor, i.e., a 90% load factor which requires daily "takes" of 135 million cubic feet. (Tr. 42 Oct. 19th proceeding) El Paso concedes that it would be [fol. 655] difficult for New Company to "digest" gas under so high a load factor. (Tr. 42)' El Paso therefore proposes to give New Company an option to sell some of this gas to El Paso during a five-year period. However, the amount of gas covered by this option is comparatively small and declines rapidly, i.e.,

1) 22 billion cubic feet per the first year
2) 18 billion cubic feet per the first year
3) 13 billion cubic feet per the first year
4) 10 billion cubic feet per the first year
5) 6 billion cubic feet per the first year

(Article IV of Tab 5)

Compared to this current El Paso proposal, Pacific Northwest had a much more valuable arrangement known as the X-5 tariff which, while not executed prior to the effective date of the merger, was in fact, filed with the Federal Power Commission prior to the merger date by El Paso and Pacific Northwest. (GX-8) The effect of this earlier arrangement was to give Pacific Northwest the option to take *as much or as little of this Kingsgate gas as it required.* Under this arrangement New Company could adjust its load factor to the needs of its market. It would free Pacific Northwest from the burden of taking this expensive Kingsgate gas at a predetermined 90% load factor and would thereby enable it to fully utilize the economy and flexibility inherent in its pipeline system which is able to tap several geographically distinct sources of supply.

The changes made by El Paso from the original version of the proposed contract (GX-8) to the proposed contract in Tab 5 of Defendant's Exhibit A are El Paso's alone. The revision was neither agreed to nor negotiated by Pacific Northwest nor New Company nor any other independent entity. New Company has never had an opportunity to bargain with respect to these important changes and the New Company management are apparently not even to be given an opportunity to disapprove of the [fol. 656] changes. We are concerned that even the Federal Power Commission may be denied an opportunity to pass on this proposed agreement prior to its being put into effect.

Since the change in this Kingsgate contract is manifestly to New Company's detriment, at the very least New Com-

pany should, when independently represented, be given an opportunity to re-negotiate any such contract. The preferred alternative is to return New Company to the same position it occupied at the time of the merger, i.e., the then existing proposal contained in Government Exhibit 8 should be filed before the Federal Power Commission and any modifications should be subject to the usual Federal Power Commission procedures in accordance with the jurisdiction of the Commission under the Natural Gas Act.

San Juan Gathering Agreement (DX-A Tab 4)

Here, too, El Paso seeks to use these proceedings to bring about changes to an agreement between itself and Pacific Northwest. The original agreement was an executed contract predating the merger and predating the stock acquisition, i.e., August 2, 1956. It was an arm's length contract providing for a reciprocal gathering change of 1.375 cents per m.c.f. for gas gathered in the San Juan Basin.

El Paso now seeks to use these antitrust proceedings to increase the rate charged to 4.5 cents per m.c.f. Yet here also the changes are unilateral. El Paso had bargained with El Paso and New Company has had no opportunity to bargain on its own behalf.

The net balance of this gathering change will be an increase to be borne exclusively by New Company and its rate-paying customers. The amounts involved are substantial and the annual *increase* will exceed $349,000 for the first year's operation and over $644,000 by the fifth year. (GX-7)

We propose that this contract also be reinstituted under its pre-merger terms. To the extent that any changes in these rate structures are required El Paso should be free to apply to the Federal Power Commission for any modification pursuant to normal Power Commission procedures.

[fol. 657]

V. Westcoast Transmission Stock

At the time of its acquisition by El Paso, Pacific Northwest had a block of Westcoast Transmission Company, Ltd. stock, representing 25% of the total stock of Westcoast. (Tr. 118) This stock was carried on Pacific Northwest's books at $5 a share (Tr. 119) for a total investment cost of $5,638,750.

Under its divestiture proposal, El Paso would sell this stock at a price of about $14 to $16 per share (Tr. 119) thus making a profit of $9 to $11 per share over book value on each of the 1,157,750 shares. (Tr. 169) Yet, no part of these substantial proceeds of $16-$20 million would be allocated to New Company.

We think it clear, that the mandate of the Supreme Court does not contemplate that El Paso shall pick and choose among the assets which it acquired, selling for its own account those which can profitably be sold while transferring the remainder to a reconstituted Pacific Northwest. The Supreme Court noted in the *DuPont* case that it would be improper to allow one who violated the antitrust laws to retain the benefits of that violation.

El Paso has advanced a novel theory that current assets are not subject to divestiture (Tr. 965) but this contention is without support in law and would impose serious burdens on New Company. The record establishes that without [fol. 658] this asset (or one of comparable value and liquidity) New Company will commence operations of a quarter billion dollar, 2,600 mile long pipeline and assume obligations to serve millions of persons in the northwest and elsewhere with *only $250 in working funds.* (DX-A, Tab 11) Without an asset comparable to the value of these Westcoast shares, New Company will have one of the highest debt to equity ratios in the industry—far higher than El Paso's. (GX-21) While Pacific Northwest's original debt was also high it should be noted that the company has now been operating profitably for over seven years

since the illegal acquisition and would normally have been expected to *retire* some debt during this period. Yet, El Paso proposes to assign more debt to New Company than Pacific Northwest had at the time of the acquisition—$180 million now (DX-A) compared with $172 million at that time. (Tr. 968) At the same time New Company will have a smaller value of net assets than Pacific Northwest then had—$243 million compared with as much as $293 million.* (DX-A, Tab 1)

[fol. 659] Due to this lack of operating funds New Company will immediately be required to borrow an additional $5 million merely to meet current operating expenses. (Tr. 57)

El Paso's failure to allocate additional equity capital to New Company by returning these Westcoast shares—or assets of equal value—will also tend to block New Company from competing with El Paso in the California market. As Peter King, an experienced pipeline financial officer testified at (Tr. 765):

> By Mr. Lipson:
>
> Q. What would the effect of a high debt-to-equity ratio of 75 per cent debt to 25 percent equity have on New Company's ability to expand operations to serve the California market? A. It would make it very difficult for New Company to do any major new financing for quite a number of years down the road.

Subsequently, Mr. King testified that at least $24 million of additional equity capital would be required to bring New

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* As of December 31, 1956, Pacific Northwest had net assets of $248,391,826. (Record of trial on the merits—El Paso Answer Para. 8; GX-71, Tr. 53-54) By May 31, 1957 when El Paso had acquired 99.8 percent of the outstanding stock of PNW, the balance sheet of Pacific Northwest and its consolidated subsidiaries showed total assets of $293,014,596. (Record on trial on the merits, GX-295, p. 48)

Company's debt ratio to an acceptable level of 65% debt at which point it could finance a pipeline to California. (Tr. 765-66)

[fol. 660] El Paso's proposed treatment of these valuable Westcoast Transmission Company shares is in marked contrast to its proposed treatment of a comparable investment in shares of Northwest Production Company, Incorporated. When El Paso acquired Pacific Northwest in 1957 it also acquired PNW's holdings of 6,664,000 shares in Northwest Production which represented 69% of the latter's outstanding stock. (Trial on Merits—GX-2, Merger Hearing, Exhibit #3) During the intervening years El Paso has acquired additional Northwest Production shares to bring its total holdings to 94%, all of which El Paso now proposes to transfer to New Company as part of this divestiture. (Tr. 241; DX-A, p. 6) The significant feature is that in recent years Northwest Production has shown substantial *losses*. (Tr. 293, 396) The following figures which are conceded to be accurate by Howard Boyd show Northwest Production's losses for each of the four years 1960-1963:

1960—	(30,018)	
1961—	(523,089)	
1962—	(1,646,427)	
1963—	(720,865)	
Total Losses—	(2,920,399)	(Tr. 396)

The size of these Northwest Production losses are quite substantial for they equal 19.31% of Northwest Production's total assets. (Tr. 397)

El Paso's distinction in the proposed treatment of the Westcoast Transmission shares and these Northwest Production shares is enlightening. Defendant is quite willing to assign to New Company the Northwest Production shares that represent losses, even though a large part of that property was acquired by El Paso *after* the merger—yet it is unwilling to return the more valuable Westcoast Trans-

mission shares all of which were acquired from Pacific Northwest at the time of the merger.

[fol. 661] VI. Tax Loss Carryover

During the period 1955-1959, Pacific Northwest had a total tax loss carryover of $53,820,698.99. (Tr. 199) The entire amount of this tax loss was used by El Paso during the intervening years. (Tr. 254)

The large amount of the tax loss was due in part to the fact that Pacific Northwest had barely commenced its operations at the time of the acquisition. As a result, the large initial cost of setting up the new business far exceeded its early sales. These initial losses, however, could have been recouped in later income-producing years as deductions from the taxes payable. Now, however, since El Paso has made effective use of these tax losses in order to reduce its own taxes, the New Company must pay full taxes on its future income unless the New Company is compensated for the loss of this very real and valuable asset. Inasmuch as income taxes are a cost of service which is recoverable from gas consumers, New Company's gas customers will be prejudiced by the future tax burden unless compensation is made.[1]

To the extent that New Company receives compensation for these tax loss carryovers it will enable the company to

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[1] The use of the tax loss by Pacific Northwest was one of the issues explored by the Federal Power Commission in the merger proceeding Docket Nos. G-13018 and G-13019. The Commission's order of December 23, 1959, authorizing the merger recognized that this benefit should inure to the consumers, and its certificate was thus granted on condition that:

> (a) Upon the consummation of the merger, El Paso shall establish and maintain a special reserve upon its books of account in such amount or amounts as shall equal the amount or amounts of all tax savings from deduction by the merged corporation of Pacific's past losses, less the amount which could have been used by Pacific if there had been no merger.

To this date, however, no such reserve has ever been established by El Paso.

overcome the burden of the heavy debt ratio required by the El Paso plan which we previously discussed in connection with the Westcoast Transmission stoc' Compensa-
[fol. 662] tion for these tax loss carryovers will therefore facilitate expansion of the New Company system into the California market.

In the interest of assuring a viable New Company, therefore, it is essential and equitable that a reserve against future taxes be set up, the amount of which would be measured by the benefit which El Paso has obtained from the use of this asset.

[fol. 663]

VII. El Paso's Proposed "Rights Offering"

El Paso proposes to transfer to New Company assets equal in value to $243,000,000. (DX-A Tab 1) These will be offset by $180,000,000 in long term debt to be assumed from El Paso—at an increased ⅛% interest rate—and $63,200,742 in equity capital. (DX-A) However, Howard Boyd has testified that the market value of New Company's equity is estimated to be between $107-$108 million which El Paso expects to receive if it spins-off New Company's shares by a "rights offering." (Tr. 152, 154) Despite this fact that these New Company shares are worth $45 million more than their book capitalization no part of this value is to inure to New Company itself. El Paso contemplates that if these shares are underwritten and spun off under this proposed "rights offering," the underwriters would receive their fee and the remainder, except for taxes, would inure solely to El Paso. Howard Boyd has stated categorically that the proceeds from the sale of these New Company shares "won't be divided [with New Company] at all." (Tr. 153)

Should New Company be established as independent and allowed to float its own capital stock it would naturally receive that $45 million for itself (less any underwriting charges) and simply treat it as a contribution to capital. There has been no showing whatever to justify El Paso's

total retention of this sum which will be derived from the issuance of New Company's shares. The only purported justification for this failure to account to New Company for any part of the profits of underwriting New Company's shares is Mr. Boyd's statement at page 153 of the transcript:

> El Paso Natural Gas Company paid for the assets of Pacific Northwest. Now we're required to divest them. When we sell them, we expect, of course, to retain the results of that sale.

The result of El Paso's plan would present an anomaly. The New Company to be created will be burdened with one [fol. 664] of the heaviest debt ratios in the industry with more debt and fewer net assets than Pacific Northwest had when it was acquired by El Paso, but El Paso itself, after being held in violation of the antitrust laws, will emerge with an after tax profit of $24.5 million.

[fol. 665]

VIII. Management

Mr. Boyd described the procedure by which El Paso contemplates the management of New Company would be selected and staffed. (Tr. 157) In summary, El Paso would select an individual for the post of chief executive and submit his name to the Department of Justice and this Court for approval. This individual would then participate with El Paso in applying for a certificate from the Federal Power Commission on New Company's behalf. (Tr. 158) Mr. Boyd testified that El Paso would supply a good deal of the talent needed to put together such a certificate application for New Company. (Tr. 158)

While the independence of New Company would not necessarily be compromised because El Paso participated in the selection of New Company's management and assisted it in the prosecution of its certificate we believe that other routes offer greater assurance of an independent management.

The Government has undertaken to show how a management of unquestioned independence could be installed in New Company. The Government has put on the stand persons totally independent of El Paso who are ready, willing and able to acquire and operate the divested properties and use them to compete with El Paso for the California markets. (Tr. 738-96) El Paso's counsel has stipulated the ability of these persons to acquire and operate the pipeline. (Tr. 742-43, 750) It is the Government's considered position that such a third party remains the best hope of creating a New Company that will be truly independent and able to compete with El Paso.

[fol. 666] Conclusion

For the foregoing reasons the proposal for divestiture submitted by El Paso should be rejected.

Respectfully submitted,

Larry L. Williams, Jack L. Lipson, Lawrence F. Noble, Attorneys, Department of Justice.

[fol. 666a] [File endorsement omitted]

[fol. 666b]

In the United States District Court

For the District of Utah

Central Division

Civil No. 143-57

[Title omitted]

El Paso's Memorandum Summarizing the Record—Filed February 23, 1965

The Court has asked the parties to summarize the record bearing upon the issues which have arisen in the course of divestiture hearings in this action. This memorandum is served and filed in compliance with that request.

Last month El Paso filed an extensive memorandum in support of its plan for divestiture. We there set forth the law dispositive of the issues created by the Government's several criticisms of El Paso's plan. This memorandum will not burden the Court's file with repetition of law already submitted. While we point out here from time to time the logical consequence of what the hearing record shows, we confine ourselves at this juncture primarily to the facts and stand upon the points and authorities cited and discussed in El Paso's earlier memorandum in support of its plan.

[fol. 666c] Under El Paso's plan New Company will receive properties of a gross value of approximately $275,000,000, including utility plant of approximately $265,000,000, and a net value of $243,000,000 (Oct. Tr. 20; Def. Ex. A, Tab 11).[1] The properties to be transferred include *all* of the operating assets El Paso acquired from Pacific Northwest, together with *all* additions and betterments thereto, and *other* assets and properties acquired with El Paso's own funds and which it did not acquire from Pacific Northwest (Def. Ex. A, p. 1). The additions and betterments to the assets El Paso acquired in the merger were constructed by El Paso with its own funds at a cost of over fifty-nine million dollars (Tr. 121), including a gasoline plant which cost more than nine million dollars and is necessary to enable New Company to process and market gas taken from the Rocky Mountain area (Oct. Tr. 24). El Paso invested thirty-five million dollars of its own funds in developing gas wells in the San Juan Basin it proposes to transfer to New Company (Tr. 175). The contract it obtained for purchase of gas entering this country at Kingsgate (Def. Ex. A, Tab 5), also to be transferred to New Company, required an investment of 3½ million dollars by El Paso to induce gas producers to sign essential related contracts (Oct. Tr. 28).

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[1] "Oct. Tr." refers to the separate reporter's transcript of the hearing held October 19, 1964. The transcript of hearings held thereafter is cited "Tr.".

All of El Paso's properties, including those acquired from Pacific Northwest, are subject to a lien securing first [fol. 666d] mortgage pipe line bonds amounting to over six hundred million dollars, and El Paso has outstanding sinking fund debentures in an amount exceeding two hundred million dollars. Consents of the holders of this debt necessary for a division of El Paso's debt between itself and New Company have been obtained (Oct. Tr. 19). It is proposed that New Company will assume approximately 145 million dollars of El Paso's mortgage debt and approximately 35 million dollars of the debt represented by sinking fund debentures, and issue its own bonds and debentures in exchange for El Paso's in that amount (Oct. Tr. 19; Def. Ex. A, Tab 2). New Company will have an initial capital structure of slightly more than 25% equity, no preferred stock, and slightly less than 75% debt (Oct. Tr. 61-62). This will place New Company in sound and excellent financial condition with excellent prospects for financing further expansion (Oct. Tr. 62). New Company's earnings will be in excess of seven million dollars per year (Def. Ex. A, Tab 12) at rates now in force.

We turn to a detailed summary of the record relating to the issues raised by the Government respecting El Paso's divestiture plan, beginning with the gas reserves New Company is to receive.

[fol. 666e]

I.

Gas Reserves

Under El Paso's plan New Company would receive *all* gas reserves and supplies El Paso acquired from Pacific Northwest (Tr. 174)[3] and, in addition, gross reserves of 3

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[3] On cross-examination, in answer to a question regarding the gas reserves El Paso proposes to turn over to New Company, Mr. Boyd testified (Tr. 174):

> "What I referred to was that we proposed to return . . . every leasehold—every contract. And if there's any other method of acquiring gas we're going to return that . . . ."

trillion cubic feet later acquired by El Paso (Tr. 176), which includes 285 billion cubic feet of El Paso's own reserves in the San Juan Basin (Pl. Ex. 10). From these additional 3 trillion cubic feet in reserves, approximately 1.3 trillion cubic feet have been consumed on El Paso's Northwest Division, and this means New Company will have net gas reserves of 1.7 trillion cubic feet more than Pacific Northwest had when El Paso acquired it (Tr. 176). These include, apart from the 285 billion feet in the San Juan Basin just mentioned, 1.02 trillion cubic feet entering this country at Kingsgate, Alberta, and 1.69 trillion cubic feet in the Big Piney and Rocky Mountain areas (Tr. 296; Pl. Ex. 10).[3] [fol. 666f] While the Government has contended that El Paso should be stripped of an additional 600 billion cubic feet of gas located somewhere in the San Juan Basin—there is no evidence as to where in the Basin this gas is to be found or any other details concerning it—the record shows without dispute that transfer to New Company of the additional San Juan reserves contended for by the Government would be economically damaging and operationally impractical, for two reasons. First, there would simply be no capacity in New Company's pipe line system to transport additional gas to the Pacific Northwest in the winter months; at those times the existing line is "stuffed tight" (Tr. 126). To transport additional reserves New Company would be required either to increase the capacity of its pipe line at a cost of over 49 million dollars (Tr. 127)

[3] Certain of the gas reserve figures read into the record by the Government from earlier El Paso and Pacific Northwest reports of various kinds show reserves estimated by a "volumetric" method no longer used for evaluation reserves underlying many of the gas wells involved. After a well has been in production for an appropriate period, information becomes available permitting evaluation of the reserves underlying it by the "pressure-production decline method," and a Government witness testified that volumetric figures are "not comparable." (Tr. 349.) El Paso's current figures in evidence here utilize, to the extent appropriate, the latter method, which tends to produce somewhat lower reserves for a given well than the volumetric method.

or to pay producers for gas it could not sell (Tr. 124). Second, the markets and customers to be served by New Company could not initially absorb additional quantities of gas, even if New Company were to increase its pipe line capacity and transport additional gas to those markets; the enormous cost of pipe line expansion would therefore accomplish the futile purpose of bringing gas to the Northwest which the market cannot presently use (Tr. 124). For this reason El Paso has proposed, in connection with the [fol. 666g] contract New Company is to acquire for the 150 million cubic feet of gas per day entering the country at Kingsgate, to relieve New Company of its obligation to purchase certain quantities of the Kingsgate gas during the summer months in the first five years of New Company's operations (Def. Ex. 1, Tab 5, pp. 4-5).

More to the point, the price of San Juan gas delivered to New Company's markets would be greater than the delivered price of gas from other available supplies. The "Sumas" gas (Def. Ex. A, Tab 3) costs 22¢ per thousand cubic feet in the Pacific Northwest (Tr. 252); "Kingsgate gas" is 25¢ or 26¢ (Tr. 248); Rocky Mountain gas is approximately 15¢ at the well head. (Tr. 249). While San Juan gas, with gathering charges, is approximately 20¢ per thousand cubic feet in the Basin (Tr. 250), its price after transporting the gas over a thousand miles from the Basin to the Pacific Northwest would be far in excess of delivered prices for Canadian or Rocky Mountain Gas (Tr. 253).[4]

The gas reserves to be owned by El Paso and New Company, respectively, after the transfers proposed in El Paso's plan, will have substantially identical reserve life indices and deliverability lives: New Company's reserves will have a reserve life index of 27.4 years and a 14-year deliverability life; El Paso's reserves will have a reserve life index of 26.8 years and a deliverability life of 14 years [fol. 666h] (Tr. 124; Oct. Tr. 29).

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[4] Gathering costs in the Rocky Mountain area are lower than those in the San Juan Basin (Tr. 251).

II.

Proposed Contracts Between El Paso and New Company

El Paso proposes to enter into four contracts with New Company (Def. Ex. A, Tabs 3, 4, 5, 6). The Government has taken exception to but two, the proposed San Juan gathering agreement (*id.*, Tab 4) and the contract under which New Company would become entitled to purchase Kingsgate gas (*id.*, Tab 5).

A. The San Juan Gathering Agreement

El Paso proposes to reestablish between itself and New Company the agreement it entered into in 1956 with Pacific Northwest for gas gathering in the San Juan Basin in identical terms, except that the charge to be made by each party for gas gathered for the other would be 4.5¢ per thousand cubic feet of gas gathered instead of 1.375¢.

The original agreement, while providing a gathering charge of 1.375¢, stated that the charge was to reflect the fair cost of gathering services in the Basin from time to time (Oct. Tr. 40) and the old agreement therefore provided for changes in the gathering charge as necessary to reflect that cost (Oct. Tr. 39). Under the 1956 agreement El Paso was required to gather gas from only 126 Pacific Northwest wells. Under the new agreement El Paso would be required to gather gas from 995 New Company wells over distances much greater than were required under the old contract (Tr. 104-105, 102).

[fol. 666i] The record shows without dispute that the present cost of gas gathering in the San Juan Basin is 6.25¢ per thousand cubic feet of gas gathered (Tr. 250). El Paso proposes a 4.5¢ charge under the new agreement upon the assumption that increased use of gathering facilities will produce a cost comparable to that amount (See Tr. 105-106). The proposed charge is the same as that recently negotiated at arm's-length between El Paso and

Southern Union Gas Company under a similar agreement for gathering in the San Juan Basin providing a gathering charge based substantially upon fair cost of service (Tr. 106-107).

Unless El Paso and New Company enter into a San Juan Gathering Agreement as an incident of divestiture, both companies would be required to construct and operate duplicate gathering systems in the Basin, construction of which would impose upon New Company an additional expenditure of millions of dollars (Oct. Tr. 39).

Under the proposed contract the greater quantity of gas would be gathered by El Paso for New Company. If El Paso were ordered to gather that gas at 1.375¢ per mcf, it would be required to perform for about 25% of its cost of service and would sustain substantial losses (See Govt. Ex. 7).[5] This is confiscation pure and simple.

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[5] The 1.375¢ charge stated in the 1956 agreement is approximately 25% of the present cost of service. In El Paso's memorandum in support of its divestiture plan filed last month, we pointed out (pp. 40, 41) that the 4.5¢ charge *proposed* is approximately 30½% of the cost of service, and that performance at 1.375¢, when compared with the *proposed* 4.5¢ charge, would involve losses to El Paso of

$342,562.00 in 1965,
411,761.00 in 1966,
507,687.00 in 1967,
596,693.00 in 1968,
604,128.00 in 1969,
632,511.00 in 1970, a total of $3,095,342.00 for the first 6 years of performance. These figures reflect, of course, increased use of the gathering facilities in the near future, a point on which El Paso and the Government agree and which, as just mentioned, is the basis for El Paso's willingness to perform gathering services at a 4.5¢ charge instead of the present fair cost of service.

[fol. 666j] B. The Kingsgate Gas Contract

Under its plan El Paso will transfer to New Company the 1.02 trillion cubic feet of Canadian gas El Paso is entitled to purchase under the Kingsgate contract (Tr.

206). To give New Company a reasonable period in which to adjust itself to this new supply, El Paso will also, in effect, assume New Company's obligation to take or pay for gas under the contract during the summer months in stated quantities for a period of 5 years after New Company begins operations (Def. Ex. A, Tab 5).

The Government seeks to impose a further senseless obligation. It insists that El Paso be ordered, in effect, to take or pay for the entire quantity of gas to be delivered to New Company at Kingsgate subject to "an unrestricted right" in New Company to take any portion of the gas it desires for its own use. This would entitle New Company to as much or as little of the Kingsgate gas as it wants and burden El Paso with the obligation to take or pay for the entire quantity without any assurances from time to time how much gas would be available for El Paso's use.

[fol. 666k] This remarkable demand was disclosed in the brief opposing El Paso's plan filed by the Government on December 4, 1964. It is based upon the document in evidence as the Government's Exhibit 8, which counsel has styled a "contract" formerly in effect between El Paso and Pacific Northwest containing the obligation the Government insists El Paso assume to New Company.

The undisputed record deals swiftly with this naive assumption. The document to which counsel points is not and never was a contract; it was never signed and no agreement of that character ever existed (Tr. 233). Entitled a "Rate Schedule", Government Ex. 8 was filed with the Federal Power Commission in connection with El Paso's application for permission to import the Kingsgate gas as an offer by El Paso to enter into such an arrangement with Pacific Northwest, its then wholly owned subsidiary, if necessary to obtain the requested permission (Tr. 232-233). The arrangement proved unnecessary.

Assumption by El Paso of such an obligation to its wholly-owned subsidiary would have been essentially a matter of bookkeeping. Such an arrangement with New Company, an independent competitor of El Paso, would

be confiscation as a matter of law and nonsense as a matter of business.

III.

The Demand That El Paso Contribute Additional Capital to New Company—the Tax Loss Carryforward and Westcoast Transmission Stock Issues

On this branch of the case the Government's claims have a naked simplicity. El Paso should be ordered, we are told, [fol. 666*l*] to pay money to New Company in two ways. First, it should transfer to New Company El Paso's stock in Westcoast Transmission Company, Ltd., which New Company would then be ordered to sell promptly on the theory that its ownership of stock in a supplier would be illegal (Tr. 680). Second, since El Paso received the tax benefits provided for in the Internal Revenue Code by carrying forward certain Pacific Northwest losses for federal income tax purposes, El Paso should pay New Company a cash sum in unspecified amount to compensate.

There is not a shred of evidence in the record supporting any *need* by New Company for such additional capital contributions. To the contrary, it is undisputed that El Paso has already invested nearly 100 million dollars of its own money in assets New Company is to receive (Tr. 121, Oct. Tr. 24, Tr. 175, Oct. Tr. 28), that New Company will be in "sound and excellent" financial condition with fine prospects for expansion (Oct. Tr. 62) and that it will have earnings in excess of 7 million dollars per year at present rates (Def. Ex. A, Tab 12).

A. Westcoast Transmission Stock

El Paso does not oppose divestiture of the Westcoast Transmission stock it received from Pacific Northwest; it *advocates* divestiture by sale to a person or persons satisfactory to the Court (Def. Ex. A, p. 1). The Government's claim is unrelated to divestiture and concerns itself with the different question *to whom* the stock will be divested.

[fol. 666m] When El Paso exchanged its own stock for that of Pacific Northwest, the exchange basis provided a price of $29 per share for Pacific Northwest's stock in Westcoast (Govt. Ex. GX-307 in evidence upon the main trial). The present market for Westcoast Transmission stock is roughly $15 per share (so stated by plaintiff's counsel, Tr. 679). The divestiture by sale proposed by El Paso will therefore produce a loss of approximately $15 per share. We submit that the nearly 100 million dollars of its own funds El Paso has invested in the properties to be received by New Company fully entitles El Paso, in return, to sell the Westcoast stock and retain the proceeds. In several weeks of divestiture hearings, we have heard no meritorious reason from the Government for its contrary proposal.

B. Tax Loss Carry-forward

The record shows only that Pacific Northwest had tax losses for the period 1955 through 1959 of about 53 million dollars (Tr. 199) and that El Paso made such use of these losses in computing its own federal income taxes as was authorized by the Internal Revenue Code (Tr. 254). There is no evidence as to just *why* El Paso should pay New Company money to "compensate" for the lawful computation by El Paso of its own income taxes, or, indeed, what the amount should be. More difficult to fathom is the logical or legal basis for the Government's contention that El Paso should compensate anyone for having acquired a financially [fol. 666n] distressed Pacific Northwest with substantial losses* and proposing to divest itself of a New Company in excellent, sound and healthy condition with assets which include nearly 100 million dollars of El Paso's own funds. In sum and substance, the Government's right hand at the Internal Revenue Service has required El Paso to compute

*See the memorandum filed by El Paso earlier this month summarizing the record respecting the financial condition of Pacific Northwest at the time of the acquisition.

its federal income tax under the law, taking into account a host of factors including Pacific Northwest's losses. The tax having been so computed, the Government's left hand at the Department of Justice conceives, without a scintilla of evidence explaining why, that El Paso might have had to pay more of its own income to the Treasury if it had not acquired Pacific Northwest and this, says the Department of Justice, is a *reason* for ordering El Paso to pay to New Company some portion *of its own income* counsel thinks might otherwise have been required to be paid in taxes. Government counsel have attempted throughout these hearings to state this absurd proposition in a variety of ways. As these proceedings near completion, we are no more edified now than we were at the outset. Elaboration of the Government's claim, however stated, provides only a deepening conviction of its fanciful unsoundness.

[fol. 666o]

IV.

The Undisputed Record Respecting El Paso's Common Stock and Common Stockholders—the Basis for a Decree Authorizing Distribution of New Company's Shares to El Paso's Stockholders

The Government has contended that distribution of New Company's stock to El Paso's common stockholders through a rights offering or direct distribution, as proposed in El Paso's plan, ought not to be permitted because, it is claimed, approximately 44% of El Paso's common stock is owned by roughly 1% of its stockholders. This is simply not true, as the record shows and we now demonstrate.

El Paso's common stock consists of approximately 23 million shares held by 117,500 stockholders *of record*. 103,000 shareholders, 88% of the stockholders, own 200 or less shares each (Def. Ex. B). Only six El Paso common stockholders own as much as ½ of 1% of the Company's total common stock; no individual shareholder owns as much as 1%; the company's employee benefit trusts own but 1.11% (Def. Ex. C, H, I, R).

The Government claim just mentioned rests upon the true statement in El Paso's Exhibit H in evidence that 1,625 stockholders *of record* own a little more than 10 million of its common shares in blocks of 1001 shares or more. But equally true and undisputed is the showing of El Paso's Exhibit R that these 1,625 shareholders of record include 171 brokers, nominees and other financial institutions holding 4,838,573 common shares owned beneficially by not less [fol. 666p] than *20,450 persons or other beneficial owners,* an average of 509 common shares held by each.

El Paso's Exhibit E in evidence establishes that a number of the Company's common shares equal to 20% of its total common stock is traded annually on exchanges. In the period of less than four years since January 1, 1961, over 16 million shares, the equivalent of 70% of total shares, were traded on the New York, Chicago and San Francisco exchanges. El Paso's transfer agent recorded transfers averaging 603,000 shares per month over the 6 month period preceding divestiture hearings in this cause, an annual average of 7,236,000 shares constituting an equivalent of over 25% of the Company's total common stock (See also Tr. 46-50).

It labors the obvious to draw from these undisputed facts the self-evident conclusions that a distribution of New Company's stock to El Paso's common stockholders would create no likelihood of sufficient common ownership of the two companies by any stockholder group sufficient to diminish the total independence of each from the other and that following such a distribution in a very short time El Paso and New Company's stock would be owned by totally different stockholder groups as a result of routine transfers of shares in each.

Conclusion

As this memorandum was nearing completion, we were served with copies of the Government's proposed Findings [fol. 666q] of Fact and Conclusions of Law and its "Brief

After Divestiture Hearings."[7] Since plaintiff has not heretofore briefed the law in any detail, as El Paso did in the memorandum in support of its plan filed last month and in the several memoranda filed while divestiture hearings were in progress, the Government's brief purports to be its major effort on the law as well as the facts and consists of some 31 pages.

On the quick reading possible in the time available, we find nothing new or persuasive in the Government's latest brief. Nor do we now attempt a comprehensive reply; should that appear necessary or appropriate we shall request leave to do so. The papers just served on us do, however, even on a quick reading provide eloquent confirmation of at least two major points worthy of comment here.

First, the Government's divestiture case closes on the same resounding note of total opposition to everything El Paso proposes, with which the Government began. Its proposed findings, which are notable for uninterrupted negativism on the one hand and outright misstatement on the other,[8] lead to but three conclusions of law: (1) El Paso's [fol. 666r] divestiture plan "does not provide for an acceptable form of divestiture" (Govt. Prop. Concl. 1), (2) that "The El Paso plan is inadequate" (Govt. Prop. Concl. 2) and that essential terms of contracts to be entered into between El Paso and New Company should be left undecided by this Court (Govt. Prop. Concl. 3). The Government's brief concludes with the equally informative and

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[7] The Court also asked the parties to submit proposed decrees (Tr. 1008). We have served and filed a proposed decree herewith; the Government did not, because it has nothing tangible to propose.

[8] E.g., Proposed Finding 19 asserts that 1,625 of El Paso's common stockholders "own about 45% of the total El Paso stock," while the record shows without dispute that these stockholders *of record* are nominees for over 20,000 beneficial owners (Def. Ex. H, R). That this record exists is acknowledged in the Government's brief, which then proceeds to misrepresent the number of beneficial owners as 12,000 (p. 8).

helpful proposal that El Paso's plan simply "should be rejected".

The Government's brief, findings and conclusions are totally devoid of any alternative plan, proposal or other suggestion. To be sure, the findings (pp. 8-11) and the brief (pp. 11-12) both claim that the Government's case includes "alternative plans". But the substance confirms what the record shows, *viz.*: That plaintiff's "alternatives" are simply unspecified proposals for sale of the properties to be divested to a purchaser in some form or another and an unfair and plainly unworkable method of stock distribution once consented to by the parties to a Sherman Act railroad case almost 50 years ago. These are neither "plan" nor "alternative".

The second noteworthy feature is the extent to which the Government's papers, particularly the brief just served, misconceives the record and piles up factual assertions and assumptions for which the record contains no support.

We are told that El Paso's stock distribution proposals should be rejected not on evidence but upon counsel's [fol. 666s] conception of the "common experience of humanity" (Br. p. 3). Defendant's Exhibit R in evidence shows without dispute that El Paso's broker and nominee common stockholders of record hold shares for not less than 20,450 beneficial owners and the Government says these number but 12,000 (p. 8).

Counsel for El Paso are repeatedly claimed to have stipulated that the three prospective purchasers of the assets to be divested who were interviewed by Government counsel on the witness stand "are financially responsible and are able to manage the pipeline" (pp. 11, 31). This, too, is untrue. El Paso stipulated only that Colorado Interstate Gas Company is able to operate a pipe line for the self-evident reason that it does so (Tr. 742).[9] The two

[9] "Mr. Harrison: If he wishes to prove Mr. King's Company [Colorado Interstate] can operate a pipeline, I will stipulate to that."

other proposed purchasers, neither of which has ever operated a pipe line and one of which was just *formed* to purchase the assets to be divested, were most certainly not stipulated capable; El Paso stipulated only to the obvious fact that the corporations represented by these witnesses were "interested in buying the company" (Tr. 778) and, in general, that "There are concerns of people willing and able to purchase the New Company" (Tr. 742).

On the gas reserve issue the Government says New Company "requires more gas reserves" than El Paso has proposed to transfer to it (Br. 13), in the teeth of the undisputed facts of record showing that the New Company would [fol. 666t] have no pipe line capacity or market for additional reserves.

The brief asserts that El Paso would make "a profit of $9 to $11 per share" (p. 23) on a sale of its Westcoast Transmission stock and appears unconcerned with the undisputed evidence that El Paso paid $29 per share.

We are told (p. 23) that El Paso "has advanced a novel theory that current assets are not subject to divestiture (Tr. 965)" as bearing upon the Government's opposition to divestiture of El Paso's Westcoast stock by sale. The transcript says at the place referred to (Tr. 965):

> "'There's nothing in the antitrust laws or any of the procedures that require current assets be disposed of *in this manner.*"

This statement, perfectly correct when quoted in full, simply underscores El Paso's point that it *proposes* to divest itself of its West Coast Transmission stock and that the Government is concerned not with divestiture but *to whom* the stock is to be divested.

As just stated, the foregoing does not pretend to reply to the Government's brief. It is but illustrative, and by no means a comprehensive summary, of the respects in which the Government throughout these proceedings has based its total opposition upon a series of unsupported

assumptions and misconceptions of what the record shows without dispute. This is not calculated, we submit, to hasten, or even assist, the divestiture without delay re-
[fol. 666u] quired by the mandate of the Supreme Court.

Gregory A. Harrison, Atherton Phleger, Robert S. Daggett, Brobeck, Phleger & Harrison, Van Cott, Bagley, Cornwall & McCarthy, By Robert S. Daggett, Attorneys for Defendant El Paso Natural Gas Company.

[fol. 666v]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil Action No. 143-57

Entered:

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants.

PROPOSED DECREE FOR DIVESTITURE FILED BY EL PASO—February 23, 1965

Plaintiff filed its complaint herein on July 22, 1957, and its amendment thereto on October 31, 1960. Defendants appeared and filed their answer on November 12, 1957. The action was tried by this Court and on November 20, 1962, a judgment was entered dismissing the action. Plaintiff appealed from the judgment. On April 6, 1964, the

[File endorsement omitted]

Supreme Court of the United States reversed the judgment of this Court and directed it to order divestiture without delay. The mandate of the Supreme Court of the United States was filed in this Court on May 5, 1964.

Defendant El Paso Natural Gas Company filed with the Court its Proposal for Divestiture dated October 13, 1964. Thereafter, the Court received testimony, documentary evidence and written and oral argument from Plaintiff and [fol. 666w] said Defendant with respect to said Proposal for Divestiture, and Plaintiff's objections and proposals in connection therewith. The matter having been submitted, and the Court being fully advised in the premises and having filed its findings of fact and conclusions of law, the plan of divestiture contained in said Proposal for Divestiture is hereby approved by this Court to the extent hereafter set forth as a necessary, desirable and appropriate method for compliance with the mandate of the Supreme Court of the United States in this action, and it is hereby Ordered, Adjudged and Decreed:

I.

As used in this Decree:

(A) "El Paso" shall mean the Defendant El Paso Natural Gas Company;

(B) "Person" shall mean an individual, partnership, firm, corporation, association or other legal or business entity;

(C) "Immediate family" shall mean, with reference to any person, the spouse, descendants, ascendants and/or brothers and sisters of such person.

II.

This Decree is binding upon Plaintiff, upon the Defendants and their subsidiaries, successors and assigns, upon each of their officers, directors, agents, employees and upon all persons in active concert or participation with them

[fol. 666x] who shall have received actual notice of this Decree by personal service or otherwise.

III.

El Paso is ordered and directed to commence effectuating the plan of divestiture herein contained in the following manner:

(A) El Paso shall promptly organize a corporation hereafter called "New Company". As soon as practicable thereafter, the parties shall be afforded an opportunity to nominate persons to serve as New Company's chief executive officer and, after notice and hearing, this Court shall appoint a person to serve in that capacity who shall be promptly employed by New Company as its chief executive officer. After notice and hearing, the chief executive officer of New Company shall appoint and employ, with the approval of this Court, such additional executives to conduct business as may be necessary or desirable. This Court, after like notice and hearing, shall appoint a Board of Directors for New Company. New Company shall submit to the jurisdiction of this Court in the above-entitled cause and shall file herein its agreement to be bound by this Decree and such further orders as may be entered pursuant to Section VII hereof;

(B) An application on behalf of New Company shall be filed with the Federal Power Commission at the earliest practicable date requesting the issuance of a certificate of public convenience and necessity authorizing New Company to acquire, own and operate the properties to be received [fol. 666y] from El Paso. New Company also shall file with the Federal Power Commission, concurrently with the transfer of assets and liabilities authorized and ordered by subsection (C) of this Section III, the same tariffs, rates, rules, regulations and other conditions of service then in effect and applicable to the service to be rendered by New Company, including the agreement of New Company to

comply with the provisions of the rate settlement agreement approved by the Federal Power Commission on January 15, 1964;

(C) When the certificate referred to in subsection (B) of this Section III has been issued by the Federal Power Commission, and when all other necessary certificates, authorizations, orders, consents and approvals have been obtained from other regulatory agencies, if any, with jurisdiction in the premises and holders of El Paso's debt securities, El Paso shall promptly transfer to New Company, and thereby divest itself of, the properties, assets and liabilities set forth in Schedule A hereto and in exchange therefor New Company shall issue to El Paso all of New Company's capital stock. Concurrently with such transfers and as partial consideration therefor, New Company shall assume El Paso's present bonds and debentures, and shall issue its own bonds and debentures in substitution therefor to the holders of El Paso's bonds and debentures, in the amounts and upon the further terms and conditions contained in Schedule B hereto, and El Paso and New Company thereupon shall execute and enter into the four agreements of which specimens are attached as Schedule C hereto;

[fol. 666z] (D) Within three years after the transfer of assets to New Company required by subsection (C) of this Section III, El Paso shall divest itself of all of its legal and equitable right, title and interest in and to its shares of stock in New Company by one or any combination of the following methods:

(1) sale or sales of said shares of stock to El Paso's common stockholders through issuance of rights to purchase said stock; or

(2) a direct single or multiple distribution of such shares to the common stockholders of El Paso;

(E) Within one year after entry of this Decree El Paso shall divest itself of all of its legal and equitable right,

title and interest in and to all shares of stock owned by El Paso in Westcoast Transmission Company, Limited, by a sale or sales thereof to such person or persons as may be approved by this Court after notice to Plaintiff;

(F) At intervals of not more than six months, El Paso shall report to this Court with respect to its progress in complying with the provisions of this Decree. Until further order of this Court, the person appointed and acting as chief executive officer of El Paso shall submit to this Court, within sixty days after receipt of any order so to do, such written data and other information as the Court may require with respect to the business and affairs of El Paso, and the person appointed and acting as chief executive officer of New Company shall submit all such data and other [fol. 666aa] information regarding the business and affairs of New Company required by the Court in like manner, to to the end that this Court may undertake and accomplish continuing supervision of the independence of El Paso and New Company each from the other; and

(G) El Paso shall take such other and further action as may be necessary and appropriate to consummate the plan of divestiture herein contained.

IV.

Immediately upon commencement of service by New Company, El Paso shall transfer all shares of stock in New Company to a trustee, first approved by this Court, with El Paso's irrevocable instructions to said trustee to exercise all voting rights with respect to said shares in accordance with instructions of this Court. Such shares of stock in New Company shall be released by said trustee only in accordance with divestiture by El Paso of its legal and equitable interest therein pursuant to the decree of this Court.

V.

Defendant El Paso is enjoined and restrained:

(A) Except as authorized by the foregoing provisions hereof, from acquiring any capital stock or financial interest whatever in New Company or any of the assets thereof;

(B) From having any person as an officer or director who is at the same time:

(1) an officer, director or employee of New Company;

[fol. 666bb] (2) except as provided in subsection (C) of this Section V, the owner of any capital stock of New Company or a person a member of whose immediate family is the owner of more than one-tenth of one per centum (1/10 of 1%) of the capital stock of New Company;

(C) From selling, transferring or in any manner distributing any of the capital stock of New Company to any person who is at the time an officer or director of El Paso, or to any person who at the time owns beneficially or in trust more than one-half of one per centum (½ of 1%) of the capital stock of El Paso, or to any person who is a member of the immediate family of the foregoing, or to the Trustee or Trustees of El Paso's Employees Retirement Income Plan and the Employees' Savings Plan of El Paso, provided, however, the stock any such person would otherwise be entitled to receive shall be delivered to and held by a trustee, so long as such ineligibility exists, for the account of such person under an agreement of trust, in form approved by this Court after notice to Plaintiff, irrevocably providing that such shares shall be voted by the trustee only in accordance with instructions received by the trustee in writing from the board of directors of New Company, and provided further that the trustee at the end of ten years, or at the earlier request of the beneficial owner, shall dispose of the legal and equitable interest of

any person who is an officer or director of El Paso, and [fol. 666cc] thereupon account to such person, and provided further that El Paso shall cause any shares held by the trustee for said Employees Retirement Income Plan or Employees' Savings Plan to be sold within three years after the transfer of assets to New Company required by subsection (C) of Section III hereof.

(D) From employing, during a period of five years from the date New Company shall first start service, any employee of New Company without first obtaining the consent in writing of New Company.

VI.

For the purpose of determining or securing compliance with this Decree, duly authorized representatives of the Department of Justice, shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to either El Paso or the New Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said Defendant to have counsel present:

(A) Reasonable access, during office hours of such Defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such Defendant, relating to any matters contained in this Decree; and

(B) Subject to the reasonable convenience of such Defendant and without restraint or interference from it, to interview officers or employees of such Defendant, who may [fol. 666dd] have counsel present, regarding any matters contained in this Decree.

Upon written request, such Defendant shall submit such reports in writing with respect to matters contained in this Decree as may from time to time be necessary to the enforcement of this Decree.

VII.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Decree to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the orders of this Court, for the amendment thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Dated:

United States District Judge

[fol. 666ee] SCHEDULE A TO PROPOSED DECREE

New Company Assets, Properties and Liabilities

Introduction

Assets, Properties and Liabilities.

This Schedule, setting forth the assets and properties to be transferred by El Paso to New Company, has been prepared on the basis that the transfer occurred on December 31, 1964, and that the securities of New Company were issued to El Paso and the debt was assumed and exchanged on that date.

Appropriate adjustment must be made to reflect any contracts, agreements, direct and contingent liabilities and claims, and additions, replacements, retirements, improvements, use, wear and tear, losses and damages (including extraordinary losses and damages), sales and purchases of gas, sales and purchases of other properties and such other changes in the assets, properties and liabilities as shall occur from December 31, 1964 to and including the date of the transfer.

The bond and debenture indebtedness to be assumed by New Company is set forth in Schedule B, and the agreements to be executed by El Paso and New Company are set forth in Schedule C. All of such properties, assets and

[fol. 666ff] liabilities, indebtedness and agreements set forth in Schedules A, B and C constitute collectively the properties, assets and liabilities to be transferred to New Company by El Paso.

Properties and Assets.

The System Map of New Company is incorporated herein as Attachment I.

The following is a general description of the system to be transferred to New Company:

Transmission System

The major transmission facilities acquired in the merger by El Paso consisting of:

(A) Approximately 391 miles of 26-inch O.D. pipeline extending from Ignacio or Station #1 located in southwestern Colorado in a generally northerly direction through the states of Colorado, Utah and Wyoming to what is known as Compressor Station #6 in Sweetwater County, Wyoming.

(B) Approximately 671 miles of 22-inch O.D. pipeline extending from a point of connection with the terminus of the 26-inch O.D. pipeline mentioned in (A) above in a generally northwesterly direction through the states of Wyoming, Idaho and Oregon to a point of termination at what is known as Compressor Station #14 located adjacent to the Oregon-Washington border in Benton County, Washington.

[fol. 666gg] (C) Approximately 420 miles of 26-inch O.D. pipeline extending westerly within the state of Washington to a point near Portland, Oregon and thence northerly to a point of termination on the U.S.-Canadian border at what is known as Station #18.

Included as a part of this transmission system are thirteen mainline compression stations having a total installed horsepower of 85,500.

In addition to the major transmission and compression facilities which have been outlined above, there are approximately 704 miles of lateral sales lines which range in size from 3½ inches through 20 inches in diameter and which are connected at various points on the 22-inch and 26-inch O.D. pipelines. In addition to these branch sales laterals, there are approximately 158 miles of various sized supply laterals ranging in size from 6⅝ inches to 30 inches in diameter. These supply laterals connect the Bar-X Field, the Piceance Field, Big Piney Field and Rangely Field with the transmission pipelines.

Since January 1, 1960 El Paso has added to the major transmission line facilities approximately 14½ miles of 30-inch O.D. line which connects the transmission system of Pacific Gas Transmission with El Paso's 16-inch lateral sales line near Spokane, Washington. In addition, several major branch line extensions have been added to the system, specifically:

(A) Approximately 96.7 miles of 16-inch O.D. pipeline extending from a point adjacent to Compressor Station #11 located in southwestern Idaho to a point of termination on the Idaho-Nevada border where it connects with Northern Nevada's Reno pipeline.

[fol. 666hh] (B) The Grants Pass line which consists of approximately 253 miles of various sized pipeline ranging from 10¾ inches to 20 inches in diameter, commencing at the 26-inch mainline system near Portland, Oregon and extending in a southerly direction to a point of termination near the town of Grants Pass, located in the extreme southwestern corner of the state of Oregon.

There have been additional branch lines or sales laterals constructed of miscellaneous sizes comprising a total length of approximately 83 miles of line having diameters of from 2⅜ inches through 10¾ inches.

A gas supply lateral approximately 9 miles in length of 12¾ inch O.D. pipe has been added connecting the 26-inch main transmission system in northeastern Utah with what is known as the Red Wash Field. An additional compressor station has been constructed and is located on the Grants Pass sales lateral mentioned above. This station, known as the Portland Station, consists of approximately 4,000 horsepower.

Field Facilities.

The field facilities acquired in the merger by El Paso, together with improvements and additions thereto, consisting of the following:

(A) In the San Juan Basin area the gathering system includes a total of 591 miles of various size pipelines, ranging from 2⅜ to 30 inches in diameter. This gathering system is connected to a total of 1,518 gross wells in which the net interest under [fol. 666ii] both contract and leasehold is 919 wells. Of this net interest, 511 is under the leasehold agreements and 408 under gas purchase agreements. Insofar as acreage is concerned, the total dedication is 394,500 net productive acres, of which 255,200 is under leasehold control and 139,300 under gas purchase contract. The Ignacio Processing Plant is located adjacent to Compressor Station #1. This plant is a conventional absorption oil plant with a design inlet capacity of approximately 300 mcf per day, and there is a dehydration plant with like capacity. There are approximately 74 miles of 4½ inch liquids pipelines in operation in conjunction with this plant.

(B) In the Big Piney area located in Lincoln and Sublette Counties, Wyoming the gathering system consists of approximately 200 miles of pipe ranging in diameter from 2⅜ inches through 18 inches and is connected with the mainline transmission system

through approximately 102 miles of 16-inch and 30-inch pipe (looped). In the gathering area, there is a field compressor station, Station #23, located in Sublette County having 6 compressor units installed with a total horsepower available of 4,620. There are approximately 293 wells with a surface dedication of 91,990 acres connected to this gathering system with production being from the Almy, Mesa Verde, Muddy and Frontier Sands. The Opal Plant processes for the removal of liquid hydrocarbons from the gas available from this producing [fol. 666jj] area, and has an inlet capacity in the range of 250 million cubic feet per day. This is a standard type oil absorption plant.

(C) In the Bar-X Field located in Grand County, Utah and Mesa County, Colorado, the New Company will be connected to 11 wells producing from the Dakota, Entrada and Morrison formations with 4,192 surface acres dedicated. The gathering system has approximately 8 miles of pipeline ranging in size from 4½ inches to 6⅝ inches O.D. It is connected to the mainline system by 6 miles of 6⅝ inch pipeline and has 1 compressor unit installed in field service with a nominal rating of 440 horsepower.

(D) In the Piceance Creek area of Rio Blanco County, Colorado, the New Company will be connected to 16 wells producing from the Douglas Creek and Wasatch formations with a total of 29,170 acres dedicated. The gathering system consists of approximately 26 miles of various diameter pipeline from 2⅜ inches to 10¾ inches, and is connected to the 26-inch mainline system with approximately 48 miles of 10¾ inch diameter pipe. Station #24 which compresses field gas to mainline pressure has two compressor units installed having a total nominal rating of 660 horsepower.

(E) The Red Wash Field located in Unitah County, Utah will deliver gas to the New Company at a central point and is connected to the 26-inch mainline by approximately 9 miles of 12¾ inch O.D. [fol. 666kk] pipeline. Although the gas is delivered at a central point, there are approximately 159 wells behind the delivery with a total dedicated acreage of 21,127 surface acres producing from the Green River formation.

(F) The Westwater Field in Grand County, Utah is also a central point delivery. Behind this delivery there are 14 wells with a surface dedication of 2,063 acres producing from the Dakota, Entrada and Morrison formations.

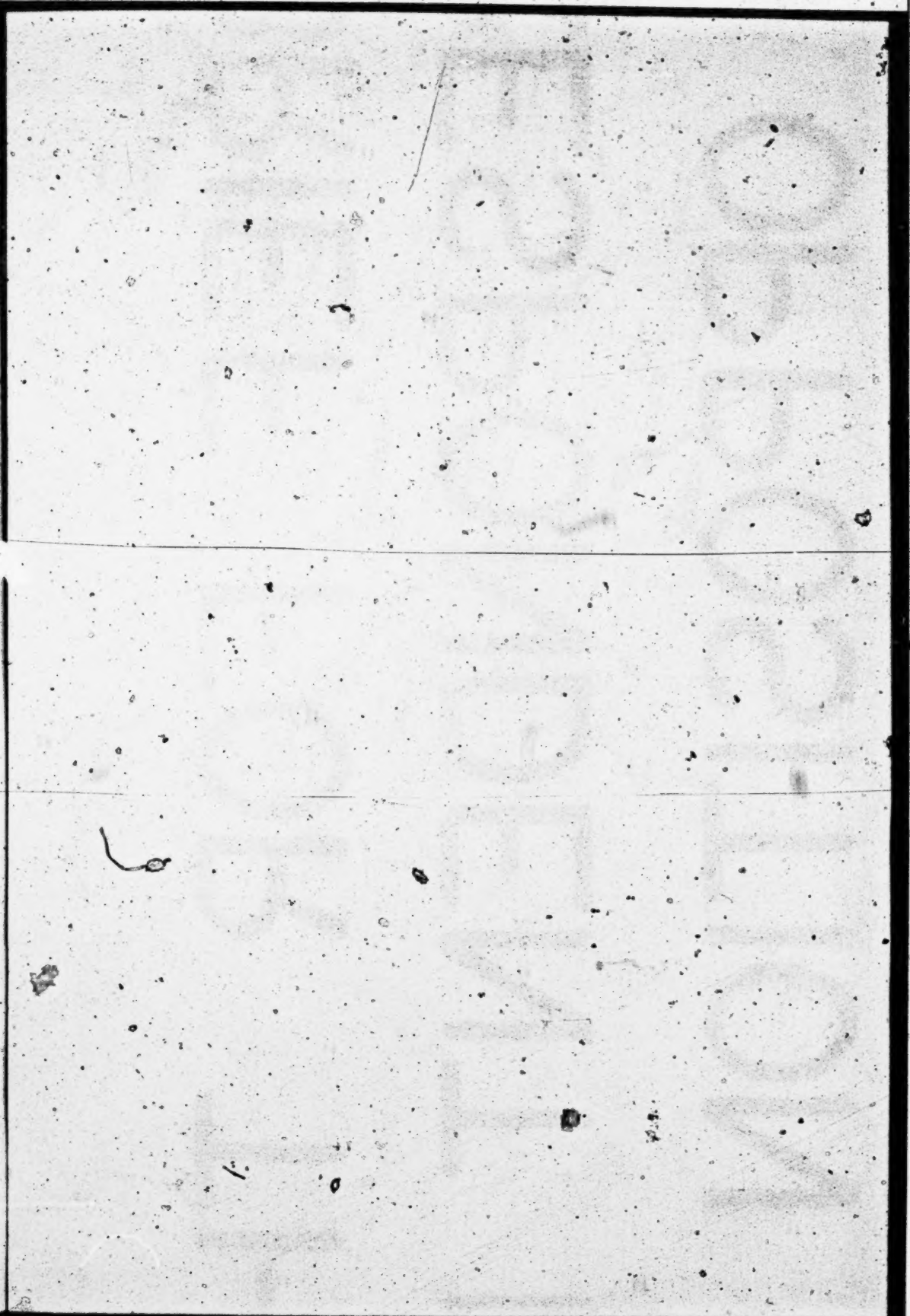
Investments and Liabilities

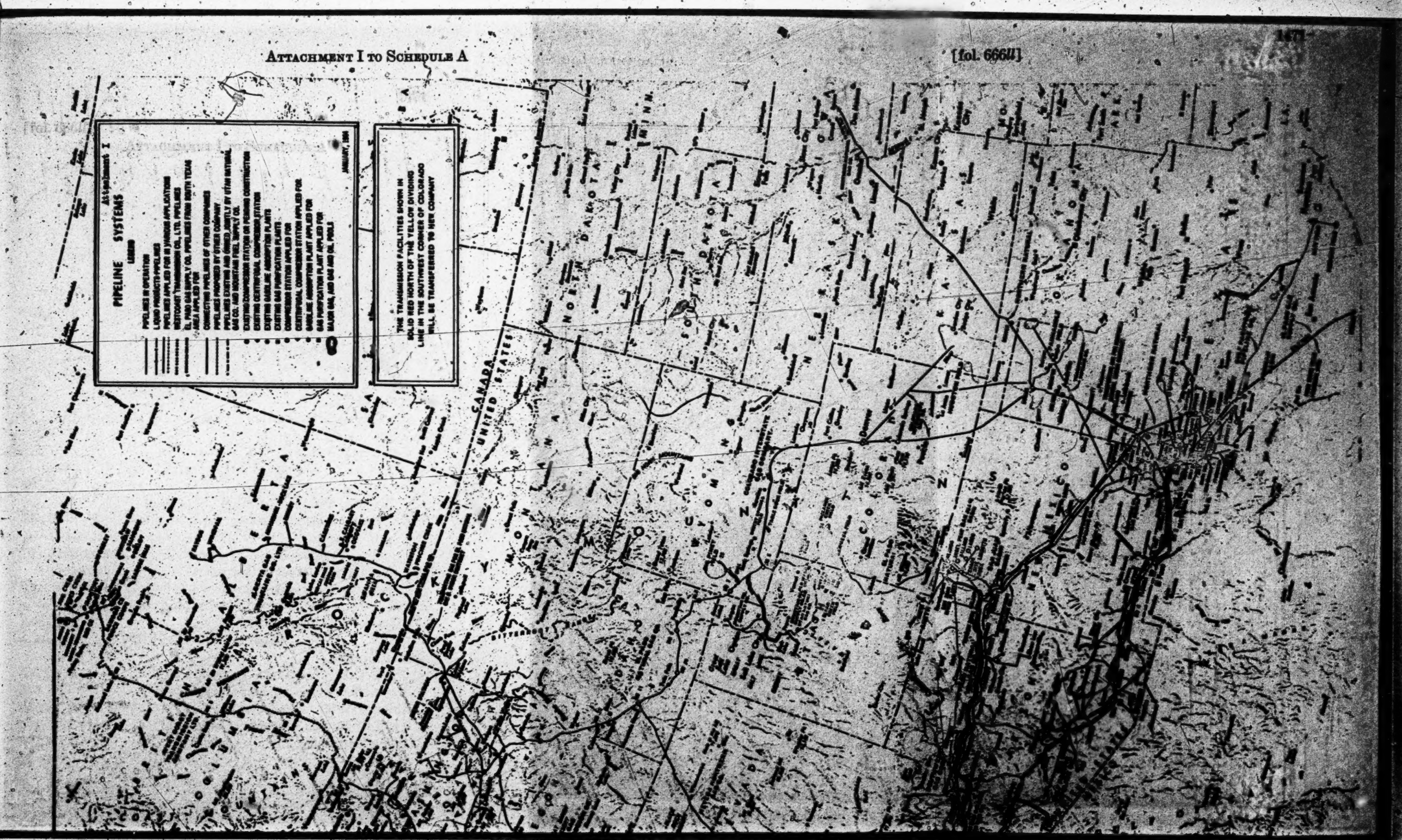
The following investments will be transferred to New Company: 94% of the outstanding capital stock of Northwest Production Corporation, 49% of the outstanding stock of Phillips Pacific Chemical Company, all of the outstanding capital stock of Pacific Northwest Realty Corporation and other investments of a minor nature.

The bonds and debentures of El Paso to be assumed by New Company are set forth in Schedule B.

The liabilities to be assumed by New Company (other than the bonds and debentures of El Paso as set forth in Schedule B) include those liabilities arising in the usual course of business and attributable to the properties and assets to be transferred to New Company by El Paso.

Attachment II is a summary schedule showing the dollar amount of the properties, assets, investments and liabilities to be transferred to New Company.




Attachment I
PIPELINE SYSTEMS
LEGEND
PIPELINES IN OPERATION
LIQUID PRODUCTS PIPELINES
PIPELINES APPLIED FOR IN VARIOUS APPLICATIONS
NORTHWEST TRANSMISSION CO., LTD. PIPELINES
EL PASO GAS SUPPLY CO. PIPELINES FROM SOUTH TEXAS AREA APPLIED FOR
CONNECTING PIPELINES OF OTHER COMPANIES
PIPELINES PROPOSED BY OTHER COMPANY
PIPELINES EXISTING AND OWNED JOINTLY BY UTAH NATURAL GAS CO. AND MOUNTAIN FUEL SUPPLY CO.
EXISTING COMPRESSOR STATION OR PENDING CONSTRUCTION
EXISTING CENTRIFUGAL COMPRESSOR STATION
EXISTING GASOLINE ABSORPTION PLANTS
EXISTING GAS PURIFICATION PLANTS
COMPRESSOR STATION APPLIED FOR
CENTRIFUGAL COMPRESSOR STATION APPLIED FOR
GASOLINE ABSORPTION PLANT APPLIED FOR
GAS PURIFICATION PLANT APPLIED FOR
MAJOR GAS AND GAS AND OIL FIELDS
JANUARY, 1954
THE TRANSMISSION FACILITIES SHOWN IN SOLID RED NORTH OF THE YELLOW DIVIDING LINE IN THE SOUTHWEST CORNER OF COLORADO WILL BE TRANSFERRED TO NEW COMPANY
NORTH DAKOTA
MINN.
SOUTH DAKOTA
CANADA
UNITED STATES

PACIFIC OCEAN
UNITED STATES
CANADA
PIPELINE SYS
THE TRANSMISSION FACILITI
SOLID RED NORTH OF THE YEL
LINE IN THE SOUTHWEST CORNE
WILL BE TRANSFERRED TO H

[fol. 666mm]

ATTACHMENT II TO SCHEDULE A

El Paso Natural Gas Company

Net Assets to be Transferred to New Company

December 31, 1964

Thousands of Dollars

Assets

Properties	
Intangible Plant	$ 3,937
Production Plant	87,815
Products Extraction Plant	14,069
Transmission Plant	207,831
Underground Storage Plant	322
General Plant	826
Plant Leased to Others	54
Plant Held for Future Use	562
Construction Work in Progress	3,170
	$318,586
Reserve for Depreciation, Depletion and Amortization	67,429
Net Gas Plant	$251,157
Other Physical Properties, net of Reserve for Depreciation	56
Net Properties	$251,213
Investments	
Northwest Production Corporation	$ 13,260
Pacific Northwest Realty Corporation	576
Intermountain Gas Company	1,520
Phillips Pacific Chemical Company	590
Belco Petroleum Corporation	1,175
Other	69
Total Investments	$ 17,190

Other Assets		
Accounts Receivable		$ 171
Materials and Supplies		1,211
Prepayments		
Prepaid Gas—Northwest Production Corporation	$1,743	
—Other	3,273	
Other	45	5,061
Preliminary Survey Charges		252
Other		112
Total Other Assets		$ 6,807

[fol. 666nn]

El Paso Natural Gas Company

Net Assets to be Transferred to New Company

December 31, 1964

Thousands of Dollars

Liabilities

Reserve for Gas Plant Adjustments	$ 10,000
Long-term Debt payable to Mobil Oil Company	469
Prepaid Gas Sales—Colorado Interstate Gas Company	840
Contributions in Aid of Construction	572
Provision for Deferred Federal Income Tax	20,065
Total Liabilities	$ 31,946

Summary

Net Properties	$251,213
Investments	17,190
Other Assets	6,807
Total	$275,210
Less: Liabilities	31,946
Net Book Value	$243,264

[fol. 66600]

SCHEDULE B TO PROPOSED DECREE

BONDS AND DEBENTURES

1. This Schedule has also been prepared on the basis set forth in Schedule A.

2. New Company will assume $145,000,000 of bonded indebtedness and $35,000,000 of debenture indebtedness of El Paso and issue—

(a) its First Mortgage Pipe Line Bonds in the aggregate amount of $145,000,000 to the holders of the outstanding El Paso First Mortgage Pipe Line Bonds, pro rata series by series, but with an interest rate ⅛ or 1% above the interest rate applicable to the respective series of the El Paso bonds, in satisfaction of New Company's obligation under the assumption of its share of the El Paso bonded indebtedness, a like amount of bonds of El Paso to be surrendered and cancelled;

(b) its Sinking Fund Debentures in the aggregate amount of $35,000,000 to the holders of the outstanding El Paso Sinking Fund Debentures pro rata, issue by issue, but with an interest rate ⅛th of 1% above the interest rate applicable to the respective issues of El Paso Debentures, in satisfaction of New Company's obligation under the assumption of its share of the El Paso Sinking Fund Debentures indebtedness, a like amount of El Paso Debentures to be surrendered and cancelled.

3. New Company will issue to El Paso all of its common stock, with a book value of approximately $63,000,000 based upon values as of December 31, 1964. The amount of Mortgage bonds and debentures to be issued by New Company (with a corresponding amount of El Paso bonds and debentures to be assumed and cancelled) and the book value of the common stock as set forth above, are based upon net

assets after depreciation as of December 31, 1964, and must be adjusted to reflect the value at the date of transfer. In any event the total amount of bonded indebtedness and de-
[fol. 666pp] benture indebtedness and other liabilities assumed by New Company shall not exceed the tax basis of the properties and assets transferred to New Company at the date thereof.

4. Consents of Bond Holders and Debenture Holders.

In order to accomplish the plan set forth in the Decree, it will be necessary to obtain the consent of the Bondholders and Sinking Fund debenture holders of El Paso to

(1) Exchange the Bonds and Debentures of El Paso for the Bonds and Debentures of New Company and

(2) To modify the Indentures in certain respects applicable to the Bonds and Debentures outstanding.

5. Terms of Mortgage and Trust Indenture.

The Mortgage and Trust Indenture of New Company will contain the provisions generally included in pipe line mortgages and trust indentures and included in the mortgage and trust indentures applicable now to El Paso.

[fol. 666qq]

SCHEDULE C TO PROPOSED DECREE

CONTRACTS BETWEEN EL PASO AND NEW COMPANY

Attachment A—Sumas Exchange Agreement

Attachment B—San Juan Gathering Agreement

Attachment C—Interim Purchase and Sale Option

Attachment D—Agreement (with respect to Rate Schedule X-4)

[fol. 666rr]

ATTACHMENT A TO SCHEDULE C

SUMAS EXCHANGE AGREEMENT

This agreement dated as of ..... by and between EL PASO NATURAL GAS COMPANY, a Delaware Corporation, hereinafter called "El Paso" and ...., a Delaware Corporation, hereinafter called "New Company",

WITNESSETH:

WHEREAS, Pacific Northwest Pipeline Corporation (Pacific) and Westcoast Transmission Company Limited (Westcoast) heretofore entered into a contract dated December 11, 1954, which contract is herein referred to as the "Border Contract" under the terms of which Westcoast agreed to sell and deliver to Pacific the volumes of gas specified therein (the maximum of which is presently 300,000 Mcf per day) and Pacific agreed to purchase and take at a point on the International Boundary between the Provinces of British Columbia and the State of Washington, and,

WHEREAS, El Paso has heretofore succeeded to the interests of Pacific and,

WHEREAS, El Paso will assign to New Company its rights, duties and obligations under the Border Contract;

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth it is mutually understood and agreed by and between El Paso and New Company as follows:

ARTICLE I

Various

1. *Right to Cancel:*

[fol. 666ss] Upon cancellation of the Border Contract by either party thereto for any reason authorized therein,

either party shall have the right to terminate this contract by written notice to be delivered to the other not later than Thirty (30) days after the happening of such contingency.

2. *Modification of Border Contract*:

New Company agrees that except in accordance with the terms thereof, it will not without first obtaining the consent of El Paso in writing, cancel the Border Contract or modify the same in any manner which would prejudicially affect the rights of El Paso hereunder or the ability of New Company to perform its obligations hereunder to El Paso.

Article II

Term

Except as provided in Article I, this agreement shall be and remain in force and effect from and after the date hereof until January First following the date of first delivery of gas hereunder, (which for the purposes of this article shall be deemed to be January 1, 1958) and thereafter for a period of Twenty (20) years, and from year to year thereafter until terminated on Eighteen (18) months' notice in writing given by either party to the other.

Article III

Definitions

Except where the context expressly states another meaning, the following terms when used in this agreement shall have the following meanings:

[fol. 666tt] 1. The term *"day"* shall mean a period of Twenty-four (24) consecutive hours beginning and ending at Eight (8:00) A. M. Pacific Standard Time.

2. The term *"month"* shall mean the period beginning at Eight (8:00) A. M. on the First day of the calendar month and ending at Eight (8:00) A. M. on the First day of the next succeeding calendar month.

3. The term *"year"* shall mean a period of Twelve (12) consecutive months beginning with January First.

4. The term *"cubic foot"* shall mean the volume of gas which occupies One (1) cubic foot when such gas is at a temperature of Sixty Degrees Fahrenheit (60°F.), and Fourteen and Nine-tenths pounds (14.9#) per square inch absolute.

5. The term *"Mcf"* shall mean One Thousand (1,000) cubic feet of gas.

6. The term *"British Thermal Units"* shall mean the amount of heat required to raise the temperature of One pound (1#) of Water One Degree Fahrenheit (1°F.) at Sixty Degrees Fahrenheit (60°F.).

7. The term *"total heating value"*, when applied to a cubic foot of gas, means the number of British Thermal Units produced by the combustion in a recording calorimeter at a constant pressure, of the amount of gas which would occupy a volume of One (1) cubic foot at a [fol. 666uu] temperature of Sixty Degrees Fahrenheit (60°F.), if saturated with water vapor, and under a pressure equal to that of Thirty (30) inches of mercury at Thirty-two Degrees Fahrenheit (32°F.) and under standard gravitational force (acceleration Nine Hundred and Eighty and Six Hundred and Sixty-Five Thousandths (980.665) cm. per second per second) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air, and when the water formed by combustion is condensed to the liquid state.

8. The term *"contract demand"* shall be the maximum volume of natural gas which New Company shall be obliged to deliver to El Paso at the Border Delivery Point hereinafter described and which El Paso has the right to demand from New Company on any day at said point.

Article IV

Purchase, Sale and Exchange of Gas

1. *Contract Demand*:

El Paso agrees to take and purchase from New Company and New Company agrees to sell and deliver to El Paso natural gas in the volume hereinafter specified, to wit:

	Contract Demand Mcf Per Day
Commencing with first deliveries:	100,000

[fol. 666vv] 2. *Exchange of Gas*:

All quantities of natural gas delivered by New Company to El Paso under Section 1 of this Article IV shall be redelivered by El Paso to New Company in exchange for concurrent deliveries of equal quantities in the manner as provided for in Section 2 of Article VI below.

Article V

Border Price and Exchange Charge

1. *Border Price Schedule*:

Subject to the adjustments hereinafter provided for, New Company agrees to sell and deliver and El Paso agrees to accept and pay for all gas delivered by New Company to El Paso at the Border Delivery Point pursuant to Article IV hereof at a demand charge of $1.095 per month per Mcf of Contract Demand and a commodity charge of $0.18 per Mcf.

2. *Exchange Charge*:

El Paso agrees to pay and New Company agrees to accept, as a reasonable charge for the exchange services rendered, the sum of three cents (3¢) per Mcf for all

quantities of natural gas delivered by New Company to El Paso at the Exchange Delivery Point provided for in Section 2 of Article VI.

3. *Minimum Annual Bill*:

The minimum annual bill payable during each year shall be an amount equal to ninety per cent (90%) of the aggregate revenues which would have resulted from: (1) the application of the demand and commodity rates described in Section 1 of this Article V on a one hundred per cent [fol. 666ww] (100%) use of the contract demand, and (2) the application of the Exchange Charge described in Section 2 of this Article V on a similar volume of gas. Any payment due under this Section 3 shall be due and payable with the December bill of each year.

In the event New Company fails to deliver to El Paso at the Border Delivery Point on any day, when requested by El Paso, ninety per cent (90%) of the contract demand, then the minimum bill for the year shall be reduced by an amount equal to the total volume of such failure multiplied by the sum of (a), (b) and (c):

(a) The Commodity Charge per Mcf.

(b) The Demand Charge per Mcf of contract demand divided by the number of days in the month such deficiency occurred.

(c) The Exchange Charge.

Article VI

Delivery and Exchange Points, and Applicable Pressures

1. *Border Delivery Point and Redelivery Point*:

The volumes of natural gas covered by Section 1 of Article IV shall be delivered by New Company to El Paso at a point on New Company's line to be mutually agreed upon (herein called the "Border Delivery Point") which

shall be within one (1) mile south of the point on the International Border where New Company may receive the gas under the Border Contract, and within a similar distance from the Border Delivery Point El Paso shall redeliver such gas without alteration, dilution or processing [fol. 666xx] to New Company at a point on New Company's line to be mutually agreed upon (herein referred to as the "Redelivery Point"). All gas delivered under this Section 1 by New Company to El Paso and redelivered by El Paso to New Company shall be at the pressures specified in Section 2 of Article VI of the Border Contract.

2. *Exchange Delivery Point:*

In exchange for natural gas redelivered by El Paso to New Company, under Section 2 of Article IV New Company shall concurrently deliver an equal volume of natural gas to El Paso at a point on New Company's main line transmission system at the outlet of New Company's Compressor Station No. 1, near Ignacio, Colorado. Said redelivery point shall herein be referred to as "Exchange Delivery Point." All gas delivered by New Company at the Exchange Delivery Point shall be at pressures requested by El Paso but not less than eight hundred pounds (800#) per square inch gauge.

Article VII

Quality

1. *General Specifications:*

All gas delivered by New Company to El Paso at the Exchange Delivery Point shall conform to the following specifications:

(a) *Oxygen:*

The gas shall not at any time have an oxygen content in excess of Two-tenths of One per cent (0.2%) by

volume and New Company shall make every reason-
[fol. 666yy] able effort to keep the gas free of oxygen.

(b) *Liquids*:

All gas to be delivered hereunder shall be dehydrated by New Company and shall in no event have a water content in excess of Seven pounds (7#) of water per One Million (1,000,000) cubic feet of gas measured at a pressure base of Fourteen and Nine-tenths pounds (14.9#) per square inch gauge and at a temperature of Sixty Degrees Fahrenheit (60°F.) as determined by dew point apparatus approved by the U. S. Bureau of Mines.

(c) *Hydrogen Sulphide*:

The gas shall not contain more than Twenty-five Hundredths (0.25) of One (1) grain of hydrogen sulphide per One Hundred (100) standard cubic feet.

(d) *Organic Sulphur*:

The gas shall not contain more than Five (5) grains of organic sulphur (mercaptans) per One Hundred (100) standard cubic feet.

(e) *Carbon Dioxide*:

The gas shall not have a carbon dioxide content in excess of One Per Cent (1%) by volume.

(f) *Dust, Gum, etc.*:

The gas shall be commercially free of dust, gums, [fol. 666zz] and other solid matter.

(g) *Temperature*:

The gas shall be at a temperature of not more than One Hundred and Ten (110°) degrees Fahrenheit.

(h) *Heating Value*:

The gas shall have a total heating value per cubic foot of not less than One Thousand (1,000) British Thermal Units.

2. *Failure to Meet Specifications*:

If the gas offered for delivery by New Company hereunder at the Exchange Delivery Point shall fail at any time to conform to any of the specifications set forth above in this Article VII, including Section 1 (h), then El Paso agrees to notify New Company of such deficiency and if New Company fails promptly to remedy any deficiency in quality as specified herein, then El Paso may, at its option refuse to accept delivery pending correction by New Company, or may accept delivery of such gas and may make changes necessary to bring such gas into conformity with such specifications, and New Company shall reimburse El Paso for any reasonable expense incurred by it in effecting changes to enable the gas to comply with the specifications set forth in sub-sections (a) through (g), inclusive, of Section 1 of this Article VII.

3. *Processing*:

The term *"natural gas"* means natural gas obtained from the wells or the residue remaining after the natural gas has been subjected to any or all of the following permissible processes:

[fol. 666aaa] (a) The removal from the natural gas as obtained from the wells of any of its constituent parts other than methane, and the removal of methane to such extent as is necessary in removing other constituents.

(b) The subjection of the gas to compression, regulation, cooling, cleaning, or any other chemical or physical process, to such extent as may be required

in its production, gathering, transmission, storage, removal from storage and delivery, but no diluents such as air or nitrogen shall be added.

Article VIII

Measurement

1. *Unit of Volume*:

The unit of volume of gas for all purposes hereunder (except for computation of heating value under the provisions of Section 7 of Article III hereof) shall be One (1) cubic foot at an absolute pressure of Fourteen and Nine-tenths pounds (14.9#) per square inch at a temperature of Sixty Degrees Fahrenheit (60°F.), computed in accordance with Boyle's Law governing pressure and volume of gases (with corrections for deviation as hereinafter provided).

2. *Determination of Volume*:

The volume of gas delivered hereunder shall be computed in accordance with the methods prescribed in Gas Measurement Committee Report No. 3, Natural Gas Department, American Gas Association, including the Appendix thereto, dated April 1955.

[fol. 666bbb] 3. *Deviation from Boyle's Law*:

The deviation of the gas from Boyle's Law at the pressures and temperatures at which the gas is metered shall be determined by tests or analyses at monthly intervals. The method of making such tests or analyses shall be determined by mutual agreement, but in the event of the inability of the parties to agree, shall be made by a laboratory selected by the parties, whose tests or analyses shall be accepted as final. The results of each such determination shall be used in computing the volumes of gas delivered

hereunder during the month next following the taking of the sample from which such determination is made.

4. *Specific Gravity*:

The specific gravity of the gas delivered shall be determined by means of recording gravitometer to be installed on the upstream side of the point where the gas is metered, and the arithmetic average specific gravity each day at such point shall be used in computing deliveries of gas during the day at such points.

5. *Flowing Temperatures*:

The flowing temperature of the gas in the meters shall be determined by means of a recording thermometer to be installed in accordance with the recommendations contained in the said Gas Measurement Report No. 3, and the arithmetic average temperature each day shall be used in computing the deliveries of gas during such day.

6. *Assumed Atmospheric Pressure*:

[fol. 666ccc] The average absolute atmospheric pressure of each delivery point hereunder shall be determined by the parties on the basis of the application of the customary formula to the actual elevation of such delivery point and such determination shall govern, irrespective of the actual elevation or location of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

7. *Heating Value*:

The heating value of the gas delivered hereunder shall be determined by means of a recording calorimeter using the Thomas Principle of calorimetry or its equal.

Article IX

Measuring Equipment

1. The delivering party at its sole cost and expense, shall install, maintain and operate at the point of each delivery, a standard type orifice meter or meters for the measuring of the quantity of gas delivered hereunder. Orifice meters shall be installed and operated in accordance with the specifications specified in Gas Measurement Committee Report No. 3, of the Natural Gas Department of the American Gas Association, dated April 1955, including the Appendix thereto. The delivering party shall cause the charts on such meter to be changed daily. The respective meter, meter readings and meter charts shall be accessible, at all reasonable times, to inspection and examination by the party receiving such gas at the point of delivery.

2. Once each month the accuracy of the measuring equip- [fol. 666ddd] ment of the delivering party shall be verified by and at its expense in the presence of the receiving party's representative and the parties shall jointly observe any adjustments which are made in such measuring equipment. If either party at any time shall notify the other that it desires a special test of any meter, the other party shall cooperate to secure an immediate verification of the accuracy of such meter and joint observation of any adjustments. The delivering party shall give the receiving party notice of the time of all tests in order that the receiving party may conveniently have its representative present. Reading, calibration and adjustment of delivering party's meters and changing of charts shall be done only by it.

3. If, upon any test, the percentage of inaccuracy shall be Two Per Cent (2%) or more, the registration of such meter shall be corrected at the rate of such inaccuracy for any period which is definitely known or agreed upon but, in case the period is not definitely known or agreed upon, then for a period extending back one-half (½) of the time elapsed since the date of the last calibration. Following

any test, metering equipment found inaccurate shall be immediately restored by the delivering party as closely as possible to a condition of accuracy. If, for any reason, any meter is out of service and/or out of repair so that the amount of natural gas delivered cannot be estimated or computed from the reading thereof, the amount of natural gas delivered during the period such meter is out of service and/or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

[fol. 666eee] (a) By correcting the error if the percentage of error is ascertainable by calibration test or mathematical calculation;

(b) By using the registration of the receiving party's check meter, if installed and accurately registering;

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

4. The receiving party, at its option and expense, may install and operate check meters to check the delivering party's meters, but measurement of gas for the purpose of this agreement shall be by the delivering party's meter, except as hereinabove specifically provided to the contrary.

5. The delivering party shall cause to be preserved for a period of at least seven (7) years all test data, charts and other records of gas measurements.

Article X

Statements and Payments

1. *Billing*:

On or before the Fifteenth (15th) day of each calendar month, New Company shall render to El Paso a statement for all natural gas delivered to El Paso under this agree-

ment during the preceding calendar month. Such statement shall be accompanied by measurement charts and records [fol. 666fff] from New Company's metering equipment for inspection and verification by El Paso, subject to return thereof within Thirty (30) days after receipt thereof.

2. *Payments:*

El Paso shall pay to New Company, at New Company's office specified in accordance with the provisions of Section 2 of Article XIV, on or before the Twenty-fifth (25th) day of each month for the natural gas delivered by New Company to El Paso under the sale and exchange provisions of this agreement during the preceding calendar month as billed in the statement for said month.

3. *Adjustments for Over and Under Billing:*

In the event an error is discovered in the amount billed in any statement rendered by New Company, such error shall be adjusted within thirty (30) days of the determination thereof provided that claim therefor shall have been made within sixty (60) days from the date of discovery of such error, but in any event, within twelve (12) months from the date of receipt of such statement.

Article XI

Possession of Gas

1. *Point of Delivery Controls:*

As between the parties to this contract, each party shall be deemed to have title to and be in control and possession of the gas deliverable hereunder from the time of receipt of such gas by it into its facilities until such time as the gas is delivered by that party from such facilities.

[fol. 666ggg] 2. *Responsibility:*

The receiving party shall have no responsibility with respect to any gas deliverable under this contract until it is

received into its facilities or on account of anything which may be done, happen or arise with respect to such gas before such delivery and receipt, and the delivering party shall have no responsibility with respect to such gas after its delivery into the facilities of the other party or on account of anything which may be done, happen or arise with respect to such gas after such delivery.

Article XII

Warranty and Title of Gas

Each party warrants generally the title to all gas delivered to the other hereunder and its right to sell or exchange the same, and warrants that such gas shall be free and clear of all liens and adverse claims, except that El Paso warrants only specially the gas redelivered by it to New Company under Section 1 of Article VI.

Article XIII

Force Majeure

No failure or delay in performance of this agreement by either party hereto shall be deemed to be a breach of this agreement when such failure or delay is occasioned by or due to any Act of God, strikes, lockouts, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraint of rulers and peoples, civil dis- [fol. 666hhh] turbances, explosions, sabotage, breakage or accident to machinery or lines or pipe, temporary or permanent failure of deliveries of gas to New Company at the International Border by Westcoast, inability to obtain pipe, materials or equipment, the binding order of any court or governmental authority, or any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming force majeure; provided that no cause or contingency shall relieve either party of its obligation to make payment for gas delivered and exchanged hereunder.

In the event of the partial or complete failure of Westcoast to deliver to New Company under all of the terms of the Border Contract the full contract demands therein stated, the applicable contract demands specified in Sections 1 and 2 of Article IV shall be reduced during the period such partial or complete failure to make such deliveries exists. The amount of the reduction shall be computed by multiplying the said contract demand hereunder otherwise applicable by a fraction the numerator of which is the amount of the deficiency in deliveries below contract demand under the Border Contract, and the denominator of which is the contract demand under said Border Contract.

Article XIV

Miscellaneous

1. *Non-Waiver of Future Default*

No waiver by either party of any one or more defaults by the other in the performance of any of the provisions of this contract shall operate or be construed as a waiver of any other or further default or defaults, whether of a like [fol. 666iii] or of a different character.

2. *Notices:*

Except as herein otherwise provided, any notice, request, demand, statement or bill provided for in this contract, or any notice which either party may desire to give to the other, shall be in writing and shall be considered as fully delivered when mailed by registered mail to the post office address of either of the parties hereto, as the case may be, as follows:

El Paso Natural Gas Company
P. O. Box 1492
El Paso, Texas, 79999

New Company

.....

.....

or at such other address as either party shall designate by formal written notice. Routine communications, including monthly statements and payments, shall be considered as duly delivered when mailed by either registered or ordinary mail.

3. *Examination of Records and Information for Billing and Dispatching*

New Company and El Paso shall furnish each other, upon request, such meter charts and other information and data as are reasonably appropriate for the purpose of billing and dispatching gas hereunder, and each party shall have the right to examine at reasonable times the records, books and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, computation or demand made hereunder pursuant to any of the provi- [fol. 666jjj] sions of this contract. Each party shall have the right to audit the others books and records for the purposes stated in this section at any reasonable time.

4. *Compliance with Laws*:

This contract and the respective obligations of the parties hereunder are subject to present and future valid laws and valid orders, rules and regulations of duly constituted authorities having jurisdiction, but in no event shall El Paso be obligated to pay more for gas delivered hereunder than the prices set forth in this contract.

5. *Assignments*:

Neither party hereto shall assign this agreement or any of its rights or obligations hereunder without the consent in writing of the other party; provided that either party may, without such consent, assign this agreement and all its rights and obligations hereunder to any wholly owned subsidiary; but neither of such assignments shall operate to relieve either El Paso or New Company of its respective obligations to the other hereunder. The provisions of this Section 5 shall not be construed to prohibit either party,

without the consent of the other party, from mortgaging or pledging this agreement or its rights hereunder to secure the payment of any bonds or other indebtedness of such party.

6. *Modification*:

There shall be no modification of the terms and provisions hereof except by the formal execution of supplementary written contracts.

7. *State Laws*:

[fol. 666kkk] This agreement shall be construed in accordance with the Laws of the State of Texas.

8. *Information for Forecasting*:

New Company and El Paso will make available to each other upon request such information and data as are reasonably necessary for the analysis and forecast of El Paso's gas requirements and the quantity of gas requirements which New Company will have available therefor.

In Witness Whereof the parties hereto have caused these presents to be duly executed by their proper officers duly authorized and their respective corporate seals to be affixed as of the day and year first above written.

New Company

By

Attest:

Secretary

El Paso Natural Gas Company

By

Attest:

Assistant Secretary

[fol. 666*lll*]

ATTACHMENT B TO SCHEDULE C

SAN JUAN GATHERING AGREEMENT

THIS AGREEMENT, dated as of ..... by and between EL PASO NATURAL GAS COMPANY, a Delaware corporation, hereinafter called "EL PASO", and ...., a Delaware corporation, hereinafter called "NEW COMPANY".

WITNESSETH:

WHEREAS, El Paso and New Company for the purpose of more properly conserving the natural resources of the San Juan Basin gas pools desire to cooperate in the gathering of certain volumes of natural gas in the San Juan Basin area of New Mexico and Colorado, to make maximum utilization of existing facilities and to avoid unnecessary duplication of facilities:

NOW, THEREFORE, in consideration of these premises, the mutual covenants and Agreements herein contained and other good and valuable considerations, the receipt and sufficiency of all of which are hereby mutually acknowledged, the parties hereto covenant and agree with each other as follows:

ARTICLE I

Definitions

Except when the context indicates another meaning, the following terms when used in this Agreement shall have the following meanings:

1. *Unit Wells:*

Gas Wells located in the San Juan Basin area of New Mexico and Colorado which are located within a defined "Unit" area and subject to the Unit Agreement and Unit Operating Agreement as approved by and filed with

the United States Geological Survey. A tract of land [fol. 666mmm] included within a gas participating area and to which an allocation of gas production is made shall be considered as a Unit Well.

2. *Non-Unit Wells:*

All gas wells located in the San Juan Basin area of New Mexico and Colorado which are other than Unit wells as described in Section 1 above.

3. *El Paso's Wells:*

Gas wells in which the gas production is owned by El Paso as a working interest owner or controlled by El Paso under a gas purchase contract.

4. *New Company's Wells:*

Gas wells in which the gas production is owned by New Company as a working interest owner or controlled by New Company under a gas purchase contract.

ARTICLE II

Joint Ownership in Production

It is recognized that in certain instances the gas production from gas wells tied into either party's system will not be completely owned or controlled by either party but that the ownership and control of the gas production from such wells will be split in varying percentages as between El Paso and New Company. For the purpose of Articles VI, VII, XII and XIII herein, such wells shall be considered as being either El Paso's or New Company's wells and the determination of ownership for such purposes shall be made as follows:

(a) *If such well is a Non-Unit Well:*

1. If either El Paso or New Company is the operator in accordance with the Operating Agreement for

such well, the well shall be considered as being [Vol. 666nnn] owned by the party designated as well operator.

2. If neither El Paso nor New Company is the operator of such well, the well shall be considered as being owned by the party owning or controlling the majority of the gas production from such well.

(b) *If such well is a Unit Well:*

1. The well shall be considered as being owned by the party owning or controlling by purchase contract the majority of the drilling block on which such well is located.

2. If the ownership of the gas production from such well is evenly divided and either El Paso or New Company is the Unit Operator, the well shall be considered as being owned by the party designated as Unit Operator.

3. If the ownership of the gas production of such well is evenly divided and neither El Paso nor New Company is the Unit Operator, the well shall be considered as being owned by the party into whose system such well is connected.

Article III

Gas to Be Exchanged

1. Subject to the limitations and conditions stated in this Agreement, New Company agrees to deliver and El Paso agrees to accept into the gathering system of El Paso the following volumes of gas:

(a) *As to Non-Unit Wells:*

Gas produced from the wells set forth on Exhibit A attached hereto and made a part hereof.

[fol. 666000] (b) *As to Unit Wells*:

Gas produced from or allocated to New Company's interest in wells connected to El Paso's gathering system in each unit area enumerated in Exhibit B attached hereto and made a part hereof.

2. Subject to the limitations and conditions stated in this Agreement, El Paso agrees to deliver and New Company agrees to accept into the gathering system of New Company the following volumes of gas:

(a) *As to Non-Unit Wells*:

Gas produced from the wells set forth on Exhibit C attached hereto and made a part hereof.

(b) *As to Unit Wells*:

Gas produced from or allocated to El Paso's interest in wells connected to New Company's gathering system in each unit area enumerated in Exhibit D attached hereto and made a part hereof.

3. It is understood that the percentage of gas allocated to New Company or El Paso for each unit area specified in Exhibits B and D shall be determined from schedules prepared by the Unit Operator from time to time to show subsequent expanded participating areas for each such unit area, which schedules are those presently furnished the United States Geological Survey, the State of New Mexico and each working interest owner in such unit area. It is further understood that the schedules reflecting the participating areas for the unit areas enumerated in Schedules B and D and in effect at the time of commencement of deliveries hereunder shall determine the initial percentages of allocation of gas for each unit area as between New Company and El Paso.

[fol. 666ppp]

ARTICLE IV

Area Encompassed

1. The gas to be exchanged is that produced from individual wells and Unit areas described in Exhibits A, B, C and D; and such other areas, formations and wells as the parties may mutually agree upon. Such other areas, formations and wells if any, are enumerated on Exhibit "F" and Exhibit "G" attached hereto and made a part hereof. Nothing in this Agreement is to be construed as requiring either party to extend its gathering system for the sole purpose of receiving gas from other party's wells.

2. In order that El Paso or New Company may accurately foresee which wells may be tied into the other's system, each agrees to keep the other informed at all times of its contemplated construction program for gathering facilities in the San Juan Basin area and to furnish the other at all times information relative to its proposed drilling program in the San Juan Basin area.

ARTICLE V

Volumes of Gas to Be Exchanged

1. It is recognized by both parties that proration is now in effect in the New Mexico portion of the San Juan Basin area and in order to receive well allowables in such pool, nominations must be made with the New Mexico Oil Conservation Commission, or any successor agency thereof, by the gas transportation facility utilizing such gas, therefore, so long as this procedure is required by the State of New Mexico, as between El Paso and New Company, each company shall include in its nominations for that pool the proportion of its re-
[fol. 666qqq] quirements which it expects to produce from wells in that pool owned or under contract to it.

2. In order that El Paso and New Company may make such preliminary determinations of gas available to its

system as may be required, each company shall furnish the other a copy of its gas nominations filed with the said New Mexico Oil Conservation Commission for each gas pool. A copy of the nomination for such pool shall be furnished at the time such nomination is filed.

3. Each party agrees to use its best efforts to take the well allowables so assigned for the account of the other party, but it is understood that neither party is obligated to operate its gathering system in such manner that the taking of said volumes would, in the reasonable judgment of the party owning said system, be detrimental to the optimum operation of said system in compliance with contract obligations of the party owning said system, market requirements, sound operating practices and applicable regulations of governmental authorities, therefore, as to the foregoing, each party reserves the right to limit the volume of gas received for the account of the other party or to exclude the taking of gas from any and all wells. It is further understood that neither party shall be required to alter the pressure on its gathering system or to supply compression in order to receive gas from the wells of the other party.

4. In the event either party wishes to disconnect its wells from the other party's system, at least thirty (30) days written notice shall be given to the other party in advance of the date such disconnection shall be made.

[fol. 666rrr] ARTICLE VI

Furnishing of Facilities

In the event wells in addition to those described in Exhibits A, B, C and D are to be connected to either parties' gathering system, the following shall apply with respect to furnishing of the facilities required for such connection:

1. *Tie Lines*:

Tie line as the term is used herein shall mean the portion of the line which extends from a point beginning at the wellhead or the outlet of the separator (if installed) to the point of connection with the nearest lateral, trunk or main line of the respective gathering system.

(a) El Paso shall furnish and install, at its own cost and expense, the tie lines and reimburse New Company for the taps installed by it necessary for El Paso to connect El Paso's wells with and deliver into New Company's gathering system.

(b) New Company shall furnish and install, at its own cost and expense, the tie lines and reimburse El Paso for the taps installed by it necessary for New Company to connect New Company's wells with and deliver into El Paso's gathering system.

2. *Right-of-Way*:

Each party shall be responsible for obtaining and maintaining all rights-of-way necessary in order to construct the tie lines from its wells into the other party's gathering system.

3. *New Company's Well Facilities*:

New Company agrees to furnish dehydrators, meters and such facilities as may be necessary to permit its wells to deliver gas into El Paso's system at such points [fol. 666sss] on El Paso's gathering system as may be mutually agreed upon.

4. *El Paso's Well Facilities*:

El Paso agrees to furnish dehydrators, meters and such facilities as may be necessary to permit its wells to deliver gas into New Company's system at such points on New Company's gathering system as may be mutually agreed upon.

5. *Points of Interconnection*:

The meter stations and appurtenances thereto at the points of interconnection which are necessary to accomplish the delivery of Balancing Gas (as hereinafter defined in Article VIII) shall be furnished, installed and operated at the sole cost and expense of the delivering party. The initial points of interconnection for delivery of Balancing Gas are specified on Exhibit E, attached hereto and made a part hereof. Additional or other points of interconnection may be installed by mutual agreement of the parties hereto in which event a revised Exhibit E will be executed and promptly filed with the Federal Power Commission or other regulatory body having jurisdiction in accordance with its applicable rules.

ARTICLE VII

Operation of Properties

1. *Non-Unit Wells*:

Each party, at its own cost and expense, shall maintain and repair its non-unit wells and tie lines and other facilities in a prudent and diligent manner, and shall do or cause to be done all things necessary to preserve [fol. 666ttt] and keep such properties in good repair, working order and condition in order to accomplish the purposes hereof.

2. *Unit Wells*:

As between El Paso and New Company in units wherein El Paso or New Company is the Unit Operator, the Unit Operator, irrespective of pipeline connection of the wells, shall maintain and repair all properties in accordance with the Unit Agreement and Unit Operating Agreement in force for such unit, but shall permit delivery to the pipeline company as hereinafter specified.

3. *Regulation of Flow*:

Irrespective of whether any well is a unit or non-unit well, the pipeline company into whose gathering system such well is connected shall have the right to regulate the flow of the gas at the point of delivery insofar as the fluctuating demand or such pipeline company's market is concerned; however, such regulation shall be subject to control by the party owning or controlling the production from such well insofar as the ability of such wells to produce and the prevention of reservoir damage by excessive rates of withdrawal are concerned.

ARTICLE VIII

Exchange and Delivery

1. It is recognized that from time to time throughout the life of this Agreement the volumes of gas being received into one party's gathering system from the other party's wells will not be equal to the volumes received into said other party's system. It is agreed that the party receiving the greater volume of gas from the other party's wells will compensate for such unequal volume by reasonably concurrent deliveries to the other party, at the points of interconnection established pur- [fol. 666uuu] suant to Section 5 of Article VI, of a volume of gas (hereinafter referred to as "Balancing Gas") equal to the difference between the volumes being received into each party's gathering system from the other party's wells. It is the intention of the parties that through exchange of gas from each party's wells and through delivery of Balancing Gas, each party shall receive a volume of gas equal to the volume being taken from its wells into the other party's gathering system and that the exchange gas shall be kept in balance as closely as is reasonably practicable.

2. It is understood that New Company and El Paso have contemporaneously herewith entered into an Interim

Purchase and Sale Option Agreement which provides for the delivery of gas (hereinafter referred to as "Option Gas") by El Paso to New Company from the San Juan Basin area. During the period such agreement is in effect, deliveries thereunder and under this agreement shall be handled as follows:

In the event that New Company has Balancing Gas deliverable to El Paso at a time when El Paso is required to deliver Option Gas to New Company such Balancing Gas shall be retained by New Company to the extent of the Option Gas deliverable to it, and any excess of such Balancing Gas over such Option Gas shall be delivered by New Company as provided for in this agreement and any excess of such Option Gas over such Balancing Gas shall be delivered by El Paso as provided for in said Interim Purchase and Sale Option Agreement.

[fol. 666vvv] Notwithstanding the provisions of this Section 2 dealing with the treatment of deliveries, for the purposes of payment it shall be assumed that all deliveries required by this agreement and the Interim Purchase and Sale Option Agreement have been made otherwise in accordance with their respective terms.

3. It is recognized that the gathering charge for Balancing Gas specified in Section 1 of Article IX was computed using a formula which took into account the volumes of gas, cost of facilities, cost of operation and other factors which were based upon estimates and on the basis of facts known as of the date hereof. It is agreed by both parties that the estimates and facts used in the formula are reasonable and acceptable for the purpose hereof as of the date of this Agreement. It is further agreed that in the event the said estimates used in the formula should after operational experience be at variance with the actual amount of such factors then existing so as to make the prevailing balancing gas

charge inconsistent with a fair cost of service, then either party may request a revision thereof, and by mutual agreement and subject to an appropriate filing with the Federal Power Commission or other regulatory body having jurisdiction the gathering charge may be revised. Revisions shall not be made more often than once each year.

4. It is agreed that each of the parties hereto shall have the right to make, and to file with the Federal Power Commission in accordance with Sections 4 and 5 of the Natural Gas Act, changes in rates and new rates or rate schedules; provided, however, either party shall have the right to protest any such changes in rates and new rates or rate schedules before said Commission, and to exercise any other rights it may have with respect thereto under the Natural Gas Act, as amended, or as it may be amended.

[fol. 666www] ARTICLE IX

Charge and Payment

1. For each one thousand cubic feet (Mcf) of Balancing Gas received pursuant to Article VIII, the receiving party shall pay a gathering charge to the other party of four and one-half cents (4.5¢) per Mcf.

2. The party so entitled to payment shall, on or before the fifteenth (15th) day of the calendar month next following the calendar month in which deliveries of Balancing Gas were made, compute and notify the other party of the volume of Balancing Gas so delivered. On or before the twenty-fifth (25th) day of the calendar month in which such notice is given, the party receiving such Balancing Gas shall make payment of the gathering charge.

3. Each party shall be responsible for and make any and all payments of money or delivery of gas in kind which may become due third parties by virtue of the production from wells on its leases or pursuant to its gas purchase contracts of the gas to be exchanged or delivered hereunder.

Article X

Pressure

1. All natural gas delivered hereunder, other than Balancing Gas, shall be at natural wellhead flowing pressures sufficient to enter the respective gathering systems; provided, however, if a well of either party is unable to produce into the other party's gathering system because of insufficient pressures, the party owning the well, at its option and own expense, may, by compression increase the pressure of such gas to make the same deliverable into the other party's gathering system. In the [fol. 666xxx] event of failure of the party owning such well to supply compression when needed, such well shall be disconnected by the party owning the gathering system until such condition is remedied by the party owning same.

2. The party delivering Balancing Gas hereunder shall return gas at the pressures existing in its gathering system, it being understood, however, that the party delivering Balancing Gas shall be under no obligation to supply compression in order to make the pressure of such Balancing Gas suitable to the receiving party.

Article XI

Quality

1. The gas delivered hereunder shall contain not more than one-fourth (¼) grain of hydrogen sulphide nor more than five (5) grains of organic sulphur per one hundred (100) standard cubic feet and not more than five percent (5%) by volume of carbon dioxide. The gross heating value of the gas delivered hereunder shall be not less than one thousand fifty (1,050) British thermal units per standard cubic foot saturated with water vapor. The gas shall be reasonably free of objectionable liquids and shall be dehydrated so that it will contain not more than nine pounds (9#) of water per one million (1,000,000) cubic feet.

2. If the gas offered for delivery by El Paso from its wells into New Company's system shall fail at any time to conform to any of the specifications set forth above in this Article XI, then New Company agrees to notify El Paso of such deficiency and if El Paso fails promptly to remedy any deficiency in quality as specified herein, [fol. 666yyy] then New Company may, at its option, refuse to accept delivery pending correction by El Paso, or may accept delivery of such gas and may make changes necessary to bring such gas into conformity with such specifications, and El Paso shall reimburse New Company for any reasonable expenses incurred by it in effecting changes to enable the gas to comply with the specifications set forth in this Article XI.

3. If the gas offered for delivery by New Company from its wells into El Paso's system shall fail at any time to conform to any of the specifications set forth above in this Article XI, then El Paso agrees to notify New Company of such deficiency and if New Company fails promptly to remedy any deficiency in quality as specified herein, then El Paso may, at its option, refuse to accept delivery pending correction by New Company, or may accept delivery of such gas and may make changes necessary to bring such gas into conformity with such specifications, and New Company shall reimburse El Paso for any reasonable expenses incurred by it in effecting changes to enable the gas to comply with the specifications set forth in this Article XI.

Article XII

Measurement

1. *Unit of Volume*:

The unit of volume of gas for all purposes hereunder (except for computation of heating value under the provisions of Section 1 of Article XI (hereof) shall be one (1) cubic foot at an absolute pressure of fifteen and

twenty-five thousandths pounds (15.025#) per square inch at a temperature of sixty degrees Fahrenheit (60° F.), computed in accordance with Boyle's Law governing pressure and volume of gases (with corrections for deviation as hereinafter provided):

[fol. 666zzz] 2. *Determination of Volume:*

The volume of gas delivered hereunder shall be computed in accordance with the methods prescribed in Gas Measurement Committee Report No. 3, Natural Gas Department, American Gas Association, including the Appendix thereto, dated April 1955, or as it may be revised, supplemented and/or superseded by reports subsequently issued by said Association.

3. *Deviation from Boyle's Law:*

The deviation of the gas from Boyle's Law at the pressures and temperatures at which the gas is metered shall be determined only at points of interconnection by tests or analyses at monthly intervals. This method of making such tests or analyses shall be determined by mutual agreement but, in the event of the inability of the parties to agree, shall be made by a laboratory selected by the parties, whose tests or analyses shall be accepted as final. The results of each such determination shall be used in computing the volumes of gas delivered hereunder during the month next following the taking of the sample from which such determination is made.

4. *Specific Gravity:*

The specific gravity of the natural gas shall be determined by the delivering party each six (6) months (joint tests if desired by receiving party) on or as near the first of each six (6) months' period as practicable by means of an Edwards type balance or by such other methods as may be agreed upon by the parties hereto.

5. *Flowing Temperatures:*

The flowing temperature of the gas in the meters shall be determined by means of a recording thermometer to be installed in accordance with the recommendations [fol. 666aaaa] contained in the said Gas Measurement Report No. 3, and the arithmetic average temperature each day shall be used in computing the deliveries of gas during such day.

6. *Assumed Atmospheric Pressure:*

The average absolute atmospheric pressure of each delivery point hereunder shall be determined by the parties on the basis of the application of the customary formula to the actual elevation of such delivery point and such determination shall govern, irrespective of the actual elevation or location of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

7. *Heating Value:*

The heating value of the gas delivered hereunder shall be determined at such times and through the use of such method as may be mutually agreeable to the parties hereto.

Article XIII

Measuring Equipment

1. The delivering party, at its sole cost and expense, shall furnish, install and maintain at each point of delivery a standard type orifice meter or meters for the measuring of the quantity of gas delivered hereunder. Orifice meters shall be installed and operated in accordance with the specifications prescribed in Gas Measurement Committee Report No. 3, dated April 1955, including the Appendix thereto, of the Natural Gas Department of the American Gas Association, or as it may be revised,

supplemented and/or superseded by reports subsequently issued by said Association.

2. Once each month at the points of interconnection and once each three months at all other delivery points, the accuracy of the measuring equipment shall be verified [fol. 666bbbb] by and at the expense of the party operating the meters in the presence of the other party's representative and both parties shall jointly observe any adjustments which are made in such measuring equipment. If either party at any time shall notify the other that it desires a special test of any meter, the other party shall cooperate to secure an immediate verification of the accuracy of such meter and joint observation of any adjustments. The party operating the meters shall give the other party notice of all tests in order that such other party may conveniently have its representative present.

3. The meters shall be operated (the term "operated" as used herein shall be limited to the reading, calibration and adjustment of meters, the changing and calculation of charts and the taking of gasoline content tests) by the following parties for each below listed situation:

   (a) *All Wells:* By the party receiving gas into its gathering system from the other party's wells.

   (b) *Points of Interconnection:* By the party making delivery of Balancing Gas.

   The charts at all points of delivery shall be changed daily, weekly, or every eight (8) days, as may be agreed upon by the parties hereto. Upon request the charts used in the calculations shall be sent to the other party subject to such charts being returned within thirty (30) days after receipt. The respective meter, meter readings, and meter charts shall be accessible at all reasonable times to inspection and examination by either party.

4. If upon any test the percentage of inaccuracy shall be two percent (2%) or more, the registration of such meter shall be corrected at the rate of such inaccuracy [fol. 666cccc] for any period which is definitely known or agreed upon but, in case the period is not definitely known or agreed upon, then for a period extending back one-half (½) of the time elapsed since the date of the last calibration. Following any test, metering equipment found inaccurate shall be immediately restored by the delivering party as closely as possible to a condition of accuracy. If, for any reason, any meter is out of service and/or out of repair so that the amount of natural gas delivered cannot be estimated or computed from the reading thereof, the amount of natural gas delivered during the period such meter is out of service and/or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

   (a) By correcting the error if the percentage of error is ascertainable by calibration test or mathematical calculation;

   (b) By using the registration of the receiving party's check meter, if installed and accurately registering;

   (c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

5. The receiving party, at its option and expense, may install and operate check meters to check the delivering party's meters, but measurement of gas for the purpose of this Agreement shall be by the delivering party's meter, except as hereinabove specifically provided to the contrary.

6. Tests for the determination of the gasoline content of the gas exchanged hereunder shall be made at the points

of interconnection as often as reasonably possible, but at least once each thirty (30) days. Similar tests at all [fol. 666dddd] other points of delivery shall be made on or as near the first of each six (6) months' period as practicable. The Natural Gasoline Association of America standard charcoal method, or such other methods as may be agreed upon, shall be used in making such tests. The content so determined shall be adjusted to the pressure base specified in Article XII hereof.

7. The party operating any meters in accordance with Section 3 of this Article shall cause to be preserved for a period of at least seven (7) years all test data, charts and other records of gas measurement for such meters.

Article XIV

Statements and Payments

1. *Billing:*

On or before the fifteenth (15th) day of each calendar month, the delivering party shall render to the receiving party a statement for gathering charges for Balancing Gas delivered under this Agreement during the preceding calendar month. Such statement shall be accompanied by measurement charts and records from delivering party's metering equipment for inspection and verification by receiving party, subject to return thereof within thirty (30) days after receipt thereof.

2. *Payments:*

Receiving party shall pay to delivering party, at delivering party's office specified in accordance with the provisions of Section 2 of Article XIX, on or before the twenty-fifth (25th) day of each month the gathering charge for Balancing Gas delivered during the preceding calendar month as billed in the statement for said month.

[fol. 666eeee] 3. *Adjustments for Over and Under Billing:*

In the event an error is discovered in the amount billed in any statement rendered by delivering party, such error shall be adjusted within thirty (30) days of the determination thereof, provided that claim therefor shall have been made within sixty (60) days from the date of discovery of such error, but in any event, within twelve (12) months from the date of receipt of such statement.

ARTICLE XV

Possession of Gas

1. *Point of Delivery Controls:*

As between the parties to this Agreement, each party shall be deemed to have title to and be in control and possession of the gas deliverable hereunder from the time of receipt of such gas by it into its facilities until such time as the gas is delivered by that party from such facilities.

2. *Responsibility:*

The receiving party shall have no responsibility with respect to any gas deliverable under this Agreement until it is received into its facilities or on account of anything which may be done, happen or arise with respect to such gas before such delivery and receipt, and the delivering party shall have no responsibility with respect to such gas after its delivery into the facilities of the other party or on account of anything which may be done, happen or arise with respect to such gas after such delivery.

ARTICLE XVI

Warranty and Title of Gas

Each party warrants generally the title to all gas delivered to the other hereunder and its right to sell or exchange

the same, and warrants that such gas shall be free and clear of all liens and adverse claims.

[fol. 666ffff] ARTICLE XVII

Force Majeure

No failure or delay in performance of this Agreement by either party hereto shall be deemed to be a breach of this Agreement when such failure or delay is occasioned by or due to any act of God, strikes, lockouts, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraint of rulers and peoples, civil disturbances, explosions, sabotage, breakage or accident to machinery or lines or pipe, temporary or permanent failure of gas supply, inability to obtain pipe, materials or equipment, the binding order of any court or governmental authority, or any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming force majeure; provided that no cause or contingency shall relieve either party of its obligation to make payment of gathering charge for Balancing Gas delivered hereunder.

ARTICLE XVIII

Taxes

1. El Paso shall pay or cause to be paid all taxes and assessments imposed on El Paso with respect to the gas delivered hereunder prior to its delivery to New Company and New Company shall pay or cause to be paid all taxes and assessments imposed upon New Company with respect to the gas delivered hereunder after its receipt by New Company. Neither party shall be responsible or liable for any taxes or other statutory charges levied or assessed against any of the facilities of the other party used for the purpose of carrying out the provisions of this Agreement.

[fol. 666gggg] 2. New Company shall pay or cause to be paid all taxes and assessments imposed on New Company with respect to the gas delivered hereunder prior to its delivery to El Paso, and El Paso shall pay or cause to be paid all taxes and assessments imposed upon El Paso with respect to the gas delivered hereunder after its receipt by El Paso. Neither party shall be responsible or liable for any taxes or other statutory charges levied or assessed against any of the facilities of the other party used for the purpose of carrying out the provisions of this Agreement.

Article XIX

Miscellaneous

1. *Non-Waiver of Future Default:*

No waiver by either party of any one or more defaults by the other in the performance of any of the provisions of this Agreement shall operate or be construed as a waiver of any other or further default or defaults, whether of a like or of a different character.

2. *Notices:*

Except as herein otherwise provided, any notice, request, demand, statement or bill provided for in this Agreement, or any notice which either party may desire to give to the other, shall be in writing and shall be considered as fully delivered when mailed by registered mail to the post office address of either of the parties hereto, as the case may be, as follows:

El Paso Natural Gas Company
P. O. Box 1492
El Paso, Texas 79999

New Company

[fol. 666hhhh] or at such other address as either party shall designate by formal written notice. Routine communications, including monthly statements and payments, shall be considered as duly delivered when mailed by either registered or ordinary mail.

3. *Examination of Records and Information for Billing and Dispatching:*

New Company and El Paso shall furnish each other, upon request, such meter charts and other information and data as are reasonably appropriate for the purposes of billing and dispatching gas hereunder, and each party shall have the right to examine at reasonable times the records, books and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, computation or demand made hereunder pursuant to any of the provisions of this Agreement. Each party shall have the right to audit the others' books and records for the purposes stated in this section at any reasonable time.

4. *Compliance with Laws:*

This Agreement and the respective obligations of the parties hereunder are subject to present and future valid laws and valid orders, rules and regulations of duly constituted authorities having jurisdiction.

5. *Assignments:*

Neither party hereto shall assign this Agreement or any of its rights or obligations hereunder without the consent in writing of the other party; provided that either party may, without such consent, assign this Agreement and all its rights and obligations hereunder to any wholly owned subsidiary; but neither of such assignments shall operate to relieve either El Paso or New Company of its respective obligations to the other [fol. 666iiii] hereunder. The provisions of this Section

5 shall not be construed to prohibit either party, without the consent of the other party, from mortgaging or pledging this Agreement or its rights hereunder to secure the payment of any bonds or other indebtedness of such party.

6. *Modification:*

There shall be no modification of the terms and provisions hereof except by the execution of a superseding agreement or superseding tariff sheets filed with the Federal Power Commission in accordance with its applicable rules.

7. *State Laws:*

This Agreement shall be construed in accordance with the Laws of the State of Texas.

8. *Information for Forecasting:*

New Company and El Paso will make available to each other upon request such information and data as are reasonably necessary for the analysis and forecast of each party's gas requirements and the quantity of gas available therefor.

Article XX

Term

The exchange of gas under this Agreement shall continue for a term of twenty (20) years commencing as of December 1, 1956 and thereafter until terminated as herein provided by written notice. In the event either party desires to terminate this Agreement at the expiration of said twenty (20) years, or at sometime thereafter, such party shall give at least six (6) months' prior notice thereof in writing.

[fol. 666jjjj] In Witness Whereof, the parties hereto have caused these presents to be duly executed by their

proper officers duly authorized and their respective corporate seals to be affixed as of the day and year first above written.

ATTEST: EL PASO NATURAL GAS COMPANY

..... By.....

ATTEST: NEW COMPANY

..... By.....

[fol. 667]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

[Title omitted]

DESIGNATION BY APPELLEE EL PASO NATURAL GAS COMPANY OF ADDITIONAL PORTIONS OF RECORD TO BE INCLUDED IN RECORD ON APPEAL—Filed February 23, 1965

To: The Clerk of the United States District Court for the District of Utah, Central Division:

In preparing the transcript of record in the above entitled cause on the appeal of Cascade Natural Gas Corporation taken February 19, 1965, please include in the transcript all portions of the record in the cause not designated in said Appellant's Notice of Appeal, together with this cross-designation and proof of service thereof.

Dated: February 23, 1965.

[File endorsement omitted]

Brobeck, Phleger & Harrison, Gregory A. Harrison, Atherton Phleger, Robert S. Daggett;
Van Cott, Bagley, Cornwall & McCarthy, Dennis McCarthy, Suite 300, 141 East First South, Salt Lake City, Utah, By: Dennis McCarthy;
Attorneys for Appellee El Paso Natural Gas Company.

[fol. 668] Proof of Service (omitted in printing).

[fol. 670]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

Civil Action No. 143-57

[Title omitted]

SUPPLEMENTAL STATEMENT OF THE FEDERAL POWER COMMISSION, AMICUS CURIAE—Filed March 1, 1965

The many days of hearing before this Court during the last four months has not resulted in any change of position on the part of the Commission from that expressed in our Statement of October 9, 1964. We are pleased by the general recognition of all parties who have appeared before the Court, and by the Court itself, of the necessity, before any plan of divestment can be consummated, for presenting the matter to the Commission for its consideration pursuant to the provisions of Section 7 of the Natural Gas Act (15 U.S.C. 717f).

During the course of the hearings a number of statements were made by the parties, or persons seeking to intervene, with respect to whether specific issues arising out of the plan which has been presented by El Paso would or would not be subject to Commission consideration at the hearing referred to above. We see no reason for the Court

[File endorsement omitted]

to attempt to resolve the question as to whether these are matters which the Commission can or would consider, a [fol. 671] determination which the Commission itself has not yet had an opportunity to make. We see no reason why this Court cannot frame a decree in a manner which, in discharging its duties under the Antitrust Act, will fully protect the Commission in the performance of its responsibilities under the Natural Gas Act. As we pointed out in our original Statement, we believe that if this Court were to determine that a particular type of divestiture plan was an appropriate or preferable means of remedying the antitrust violations, it would be feasible to direct that appropriate applications be filed with the Commission consistent with the terms of the approved method of divestiture. The Court would of course retain jurisdiction to consider the continuing validity of the antitrust relief as a result of any conditions which might be imposed by the Commission in approving the applications.

To this end we would urge that in issuing its order providing for divestiture (whether the position espoused by El Paso or the United States is the foundation for that order), the Court should not make any finding that it is "necessary in the public interest" that specific properties, by precise designation, be divested to New Company or, conversely, that the public interest does not require the divestment of additional properties.

For the further assistance of the Court we have set forth below the language which we believe the Court might wish [fol. 672] to insert in any decree to achieve the objectives discussed above and in our original Statement of October 9, 1964:

(A) An application on behalf of New Company shall be filed with the Federal Power Commission at the earliest practicable date requesting the issuance of a certificate of public convenience and necessity authorizing New Company to acquire, own and operate the properties to be received from El Paso and El Paso shall file such authoriza-

tion for abandonment of such facilities as may be determined to be required under the Natural Gas Act.

(B) If the Federal Power Commission orders the issuance of a certificate in accordance with the Court's Order of Divestment without change and such Commission order becomes final, and upon securing such other governmental certificates, authorizations, consents and approvals as may be necessary, El Paso shall promptly divest itself by transfer to New Company of the properties, assets and related liabilities set forth in this order of divestment. If the Federal Power Commission imposes any condition upon the certificate which may be issued following this Court's order of divestment as submitted to it, then either the United States or El Paso may within ——— days of such action, apply to the Court to secure its view as to whether such modifications are compatible with the antitrust relief to be herein [fol. 673] ordered, and should the Court hold that such modifications are inconsistent with appropriate antitrust relief, it may direct El Paso and New Company to take such further action as may be appropriate to withdraw or modify their applications before the Commission.

Respectfully submitted,

Richard A. Solomon, General Counsel; William I. Harkaway, Attorney.

Federal Power Commission
Washington, D. C., 20426

[fol. 674] Certificate of Service (omitted in printing).

[fol. 675]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-67

[Title omitted]

MOTION FOR AN ORDER DISMISSING APPEAL AS FILED BY STATE OF OREGON—Filed March 9, 1965

Comes now the State of Oregon ex rel. Public Utility Commissioner of Oregon by and through its attorneys and, based upon the stipulation filed contemporaneously herewith, moves the Court for an order dismissing and holding for naught its appeal to the Supreme Court of the United States, notice of which was filed herein on or about January 15, 1965.

Robert Y. Thornton, Attorney General; Lloyd G. Hammel, Assistant Attorney General, Chief Counsel, PUC; By Richard W. Sabin, Assistant Attorney General, Of Attorneys for the State of Oregon ex rel. Public Utility Commissioner of Oregon, 103 Public Service Building, Salem, Oregon 97310.

[File endorsement omitted]